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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether respondents have standing to challenge a regulation jointly issued by the Secretary of the Interior and the Secretary of Commerce that merely interprets the statutory obligations of federal agencies under Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a)(2), where respondents have not challenged any specific action by an agency upon whom the statutory obligations actually fall.

2. Whether the Secretaries' construction of Section 7(a)(2) of the Endangered Species Act, which requires federal agencies, in consultation with the appropriate Secretary, to ensure that their actions are not likely to jeopardize any endangered or threatened species, as inapplicable to activities in foreign countries, is consistent with the Act.

PARTIES TO THE PROCEEDING

The petitioner is Manuel Lujan, Jr., in his official capacity as Secretary of the Interior. The respondents are Defenders of Wildlife, Friends of Animals and Their Environment, and the Humane Society of the United States.

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DEFENDERS OF WILDLIFE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 911 F.2d 117. The opinion of the district court (App., *infra*, 21a-32a) is reported at 707 F. Supp. 1082. Prior opinions of the court of appeals (App., *infra*, 33a-54a) and the district court (App., *infra*, 55a-64a) are reported at 851 F.2d 1035 and 658 F. Supp. 43, respectively.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1990. A petition for rehearing was denied on December 10, 1990. App., *infra*, 65a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*, and 50 C.F.R. 402.01, are set forth at App., *infra*, 66a-80a.

STATEMENT

1. a. This case involves a challenge by the three respondent organizations to an administrative interpretation of the geographic reach of Section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. 1536(a)(2). Section 7(a)(2) requires "[e]ach Federal agency * * *, in consultation with and with the assistance of the Secretary [of the Interior or Commerce, as appropriate, to] insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical."

The Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), on behalf of the Secretary of the Interior and the Secretary of Commerce, have issued joint regulations interpreting Section 7 and announcing procedures through which they are available to consult with other agencies about actions covered by the ESA. 50 C.F.R. Pt. 402 (1989). As originally promulgated in 1978, the regulations interpreted Section 7(a)(2)'s requirement that federal agencies engage in such consultation to ensure that their actions do not jeopardize the continued existence of a listed species as applying to actions "in the United States, upon the high seas and in foreign countries." 43 Fed. Reg. 870, 874 (adding 50 C.F.R. 402.01).

On the other hand, the Interior Department took the position as early as 1976, in an opinion by the Assistant

Solicitor for Fish and Wildlife, that the Secretary's responsibility under Section 7(a)(2) to designate the "critical habitat" of listed species *does not* apply in foreign countries. The Assistant Solicitor found it significant that Section 7(a)(2) requires the Secretary to consult with affected States regarding critical-habitat designations but makes no mention of foreign governments; that by contrast, Sections 4 and 8 of the ESA, which authorize the listing of foreign species and furnishing of assistance to foreign governments to preserve their threatened and endangered species, expressly provide for consultation with foreign governments (16 U.S.C. 1533 (b)(1)(A) and (5)(B), 1537); and that designations by the United States Government of critical habitats in foreign countries would be an internationally sensitive issue and would present serious practical difficulties. Gov't C.A. App. 10-15.

b. The initial position of FWS and NMFS that Section 7(a)(2)'s requirement that agencies ensure, after consultation, that their actions do not jeopardize the continued existence of a listed species *does* apply to activities in foreign countries aroused strong objections from the Departments of State and Defense, as well as other agencies that fund or carry out such activities. Those agencies expressed the view to FWS and NMFS that this interpretation was inconsistent with the presumption against extraterritorial application of an Act of Congress; that there was no basis in the text, legislative history or purposes of Section 7(a)(2) for concluding that Congress intended to treat actions that might jeopardize endangered or threatened species in foreign countries differently from actions that might affect the habitat of such species; and that the application of Section 7(a)(2) to activities abroad would be viewed by foreign governments as an unwarranted interference with matters within their jurisdictions. See Gov't C.A. App. 33-36, 43-52, 56-72.

In August 1979, the Solicitor of Interior ordered a reexamination of this question, and in 1981, the Associate Solicitor for Conservation and Wildlife rendered an opinion concluding that the Interior Department's earlier interpretation had been wrong. Gov't C.A. App. 53, 73-79. He reasoned that the 1978 amendments to the ESA, which allow exemptions from the rigid no-jeopardy standard in Section 7(a)(2) following a procedure that involves the "affected States" but make no mention of foreign governments (see 16 U.S.C. 1536(e)-(l)), show that Congress did not intend to reach activities in foreign countries. *Id.* at 75-77. The Associate Solicitor also reasoned that application of Section 7(a)(2)'s no-jeopardy and consultation requirements to activities in foreign countries would implicate "foreign sovereignty considerations," "cause significant delays in administering assistance activities in foreign countries," and "severely hamper the flexibility and responsiveness of American diplomacy abroad." *Id.* at 78.

FWS and NMFS published a proposed rule incorporating the reinterpretation in 1983, 48 Fed. Reg. 29,990, and a final rule in 1986, 51 Fed. Reg. 19,926. The new regulation states that the obligation under Section 7(a)(2) to consult with FWS or NMFS applies only to activities in the United States or upon the high seas. 50 C.F.R. 402.01 (1989). The preamble to the amended regulation explains that the change was necessary "because of the apparent domestic orientation of the consultation and exemption processes resulting from the [1978] Amendments, and because of the potential for interference with the sovereignty of foreign nations." 51 Fed. Reg. at 19,929. The preamble also notes that FWS and NMFS perform only an "advisory function under Section 7" and that "the Federal agency makes the ultimate decision as to whether its proposed action will satisfy the requirements of section 7(a)(2)." *Id.* at 19,928.

2. In October 1986, the respondent organizations filed this action against the Secretary of the Interior (but not the Secretary of Commerce), seeking a declaratory judgment that the Secretary's revised interpretation is erroneous and an injunction requiring the Secretary to issue a new regulation stating that Section 7(a)(2)'s consultation obligation applies to federal agency actions in foreign countries. On February 25, 1987, the district court granted the Secretary's motion to dismiss the complaint for lack of standing. App., *infra*, 55a-64a. The court first rejected respondents' effort to base their standing on their members' interest in the proper enforcement of the ESA as inconsistent with this Court's decisions holding that an asserted right to have the government act in accordance with the law is insufficient to satisfy Article III standing requirements. App., *infra*, 59a-60a (citing *Allen* v. *Wright*, 468 U.S. 737, 754 (1984), and *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 483-484 (1982)).

Respondent Defenders of Wildlife (Defenders) did identify several U.S.-assisted projects in foreign countries that had been visited by several of its members and that had not been the subject of formal consultation with the Secretary of the Interior pursuant to Section 7(a)(2) of the ESA. The court held, however, that those projects—the Mahaweli Project in Sri Lanka (which involves construction of dams and irrigation works on the Mahaweli River and is assisted in part by the Agency for International Development (AID)) and the rehabilitation of the Aswan High Dam in Egypt (which is assisted by the Bureau of Reclamation)—did not "provide a sufficient basis for showing an actual or threatened injury traceable to the Secretary's reinterpretation of Section 7." App., *infra*, 62a.[1] The court pointed out that "the final

[1] The court of appeals rejected Defenders' reliance on the Picchis-Palcazu Project in Peru, which was once assisted by AID, because

decision of whether to proceed or continue with a project lies with the acting agency," yet respondents had "not sought to enjoin the agency action that they contend is allegedly causing them harm," but instead sought to "have the court construe the ESA in the abstract." *Id.* at 63a. If it determined that the Secretary's interpretation of Section 7(a)(2) is erroneous—and if the agencies concerned did not then voluntarily initiate consultation—"[respondents] would have to bring a second lawsuit to enjoin the agency action as it relates to those particular projects." *Id.* at 63a-64a. Thus, the court concluded, Defenders "failed to request a remedy that will redress the injury [it] is relying on to show standing." *Id.* at 63a.

3. a. A divided panel of the court of appeals reversed and remanded. App., *infra*, 33a-54a. The court of appeals first concluded that respondents had pleaded sufficient injury-in-fact to establish Article III standing. App., *infra*, 40a-44a. It believed that Defenders had adequately alleged that the specific projects visited by its members were increasing the rate of extinction of endangered species. *Id.* at 41a-42a. In addition, the court held that respondents had pleaded a "procedural harm" based on an asserted violation of "procedural rights" under the ESA—namely, respondents' asserted right, in light of their interest in the administration of the ESA, to have federal agencies consult with one another about possible injury to a listed species. *Id.* at 42a-44a.

The court of appeals also held that respondents satisfied the further Article III requirements of showing that the injury they allege "'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Valley Forge*, 454 U.S. at 472 (quoting *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)). See App., *infra*, 44a-50a. Although the Secretary pointed out that there was no

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a member of Defenders "came only within several hundred miles" of the project. App., *infra*, 9a n.2.

indication that the projects Defenders identified would actually affect endangered or threatened species, the court held that Defenders' standing did not depend on proof of such harm. Instead, the court held that Defenders could rely on the proposition, which it found "implicit" in Defenders' allegation of "procedural injury," that an agency's failure to consult with the Secretary would create a "risk" that it might overlook harm to endangered species. *Id.* at 46a.

Relying on *United States* v. *SCRAP*, 412 U.S. 669 (1973), the court rejected the Secretary's further contentions that causation and redressability are lacking here because (1) it is up to the agency concerned to decide whether to consult with the Secretary, and the interpretation of Section 7(a)(2) in the Secretary's regulation (or any court-ordered revision thereof) would not require any action agency to consult or to make any decision about a particular project, and (2) the final design of a foreign project in any event depends on the independent actions of the foreign government. App., *infra*, 47a-50a. In the court's view, "Congress itself ha[d] legislated the requisite causation and redressability" by determining that "consultation between the Secretary and the action agency" is the "remedy" for the alleged "harm" to the "personal, professional, and aesthetic interests" of Defenders' members. *Id.* at 49a, 50a. The court likewise held that Defenders was not required to seek injunctive relief against action by federal agencies whose projects in foreign countries allegedly would harm protected species, rather than against the Secretaries' interpretative regulation. Without elaboration, the court stated it was "satisfied" that an injunction requiring the Secretary to revise the regulations "would result in consultation, which in turn would foreclose the possibility that harm to endangered species will be overlooked." *Id.* at 50a.

b. Judge Bowman dissented from what he termed the majority's "slighty surrealistic" holding that respondents have standing. App., *infra*, 51a. He found the alleged

causal link between the new interpretative regulation and any harm to endangered species in foreign countries "far too speculative, attenuated, and remote to support standing," since the ESA does not give the Secretary of the Interior either "the power to order an action agency to comply with his requests or to veto its decision," or "any power to direct the actions or decisions of a foreign country." *Ibid.* For the same reason, Judge Bowman concluded that respondents did not satisfy the redressability requirement for standing, since even if the Secretary was required to revise the regulation, "the action agency and the host nation still would be legally entitled to exercise their independent judgment concerning proposed projects." *Id.* at 52a.

4. On remand, the Secretary moved for summary judgment on the question of standing, after taking the depositions of several members of the respondent organizations who had allegedly suffered injury. Respondents made no attempt to bolster the factual record on the standing issue; they simply moved for summary judgment on the merits. On February 15, 1989, the district court granted respondents' motion. App., *infra*, 21a-32a. Although the court acknowledged that respondents had to affirmatively prove their standing at the summary judgment stage, the court "fe[lt] that the Eighth Circuit ha[d] already determined the standing question in this case" when it reversed the district court's order granting the Secretary's motion to dismiss, and that "[t]he new 'proof' and arguments offered by the Secretary do not vary the situation enough to merit an analysis differing from that given by the Eighth Circuit." *Id.* at 24a-25a. On the merits, the district court disagreed with the interpretation in the joint regulations and held that the consultation requirement in Section 7(a)(2) applies to activities in foreign countries. *Id.* at 25a-30a. The court therefore ordered the Secretary to publish regulations "clearly recognizing the full mandate" of Section 7 as requiring each federal agency to consult with the Secre-

tary on projects that may affect endangered or threatened species, wherever found. *Id.* at 31a.

5. The court of appeals affirmed. App., *infra*, 1a-20a. In holding that Defenders has standing, the court cited affidavits of two of Defenders' members that, in its view, showed that they "had visited, and planned to visit again, the endangered species or their habitat in the areas that may be affected by" the Mahaweli Project in Sri Lanka and the Aswan High Dam in Egypt. *Id.* at 7a. The court further held that even if none of its members had a "geographical nexus" to foreign projects that might harm endangered or threatened species, Defenders had satisfied Article III standing requirements by demonstrating a "procedural injury" based on "the Secretary's failure to follow the required consultation procedure." *Id.* at 9a-10a. The court believed that the "ambitious purpose" of the ESA and the existence of its citizen-suit provision (16 U.S.C. 1540(g)) indicated that Congress "intended to bestow procedural rights upon environmental organizations such as Defenders." *Id.* at 10a-11a.

On the merits, the court of appeals agreed with the district court that Section 7(a)(2) should be construed to apply to activities in foreign countries. App., *infra*, 11a-20a. The court acknowledged that statutes are presumed to have domestic scope only and that this presumption may be overcome only by a "clear expression of congressional intent." *Id.* at 13a, 19a. And the court further recognized that in light of this presumption, the general phrasing of Section 7(a)(2), which requires each federal agency to ensure (after consultation) that "any" action it funds or carries out is not likely to jeopardize the existence of "any" listed species, is insufficient to render that requirement applicable to projects in foreign countries. *Id.* at 12a-13a. But despite this acknowledged inconclusiveness of the text of the relevant statutory section, the court of appeals ruled that it owed "no deference" to the Secretary's construction of that section under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-843 (1984). App., *infra*, 15a.

The court instead believed that a congressional intent to apply Section 7(a)(2) to activities in foreign countries could be "gleaned" from *other* sections of the ESA (App., *infra*, 15a): the prefatory declaration that the United States had pledged itself in the international community to conserve various species and had entered into international agreements to that end (16 U.S.C. 1531(a)(4) and (5)); the provision for the Secretary to list species in a foreign country, taking into account the views and conservation efforts of its government (16 U.S.C. 1533(b)(1)(A), (1)(B) and (5)(B)); and Section 8 of the Act, entitled "International Cooperation," which authorizes assistance to foreign nations in conserving endangered and threatened species (16 U.S.C. 1537). *Id.* at 13a-15a. The court rejected the Secretary's contention that it is through Section 8 (as well as Section 9, 16 U.S.C. 1538, which prohibits importation of listed species), not extraterritorial application of the no-jeopardy standard and the ancillary consultation requirement in Section 7(a)(2), that Congress addressed the conservation of endangered or threatened species in foreign countries. The court also believed that when Congress amended the ESA in 1978, it gave "tacit approval" to the initial administrative interpretation that Section 7(a)(2) applies overseas. *Id.* at 17a.

In so ruling, the court did not dispute the Secretary's representation that such an interpretation of Section 7(a)(2) would have adverse consequences for the Nation's foreign relations, since it would be regarded "as an intrusion upon the sovereign right of foreign nations to strike their own balance between development of natural resources and protection of endangered species." App., *infra*, 20a. But the court concluded that although "Congress may decide that its concern for foreign relations outweighs its concern for foreign wildlife," the court would not make such a decision on Congress's behalf. *Ibid.*[2]

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[2] The Secretary's petition for rehearing, with suggestion of rehearing en banc, was denied on December 10, 1990, with two judges

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is extraordinary in several respects. It interprets the scope of Section 7(a)(2) of the Endangered Species Act in the context of an abstract dispute over advisory regulations promulgated by the Secretary of the Interior and Secretary of Commerce to assist other agencies, not in the context of an actual controversy over a specific agency action to which the obligations of Section 7(a)(2) assertedly attach. And it requires the Secretary to promulgate new regulations incorporating the court's expansive view of the law, even though respondents were unable to show that the existing regulations had actually affected any particular agency action or foreign project—and even though the court was powerless in any event to prevent whatever harm to endangered species might result from a project in a foreign country. The interpretation of Section 7(a)(2) by the courts below in this abstract setting is a classic example of an advisory opinion, which it is beyond the jurisdiction of an Article III court to render. *Muskrat* v. *United States*, 219 U.S. 346, 354, 361-362 (1911); Correspondence of the Justices, *reprinted in* 3 *The Correspondence and Public Papers of John Jay* 486-489 (H. Johnston ed. 1891).

The court of appeals' holding that respondents nevertheless have standing to challenge the interpretative regulations conflicts with repeated rulings by this Court that Article III requires a litigant to prove that he has suffered injury-in-fact that was caused by the challenged conduct of the defendant and that is likely to be redressed by the relief sought. In addition, the court of appeals' notion that respondents suffer a judicially cognizable "procedural injury" if an agency fails to consult with the Secretary about a particular foreign project, even if their members have no concrete geographical

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voting for rehearing en banc. App., *infra*, 65a. On January 7, 1991, the court of appeals stayed its mandate pending the filing and disposition of this certiorari petition.

nexus to the project site, finds no support in Section 7(a)(2), squarely conflicts with decisions of other courts of appeals, and invites wholesale circumvention of this Court's standing precedents by litigants having nothing more than a generalized interest in the conduct of the government.

The court of appeals' ruling on the merits—that the substantive no-jeopardy standard and the ancillary consultation requirement in Section 7(a)(2) apply to activities in foreign countries—is at odds with the text and legislative history of the Act, which show that Congress was concerned with domestic conditions in Section 7(a)(2) and separately addressed conservation of species in foreign countries through international cooperation, and with appellate decisions holding that other environmental statutes do not apply in foreign countries. The decision below also cannot be reconciled with the presumption that obligations imposed by Acts of Congress do not apply to activities in a foreign country, especially those undertaken by or with the approval of the foreign government concerned. Finally, the court of appeals plainly erred in giving no deference to what is, at the very least, a reasonable interpretation of Section 7(a)(2) by the Secretaries of Interior and Commerce and by the Executive Departments responsible for the conduct of the Nation's defense and foreign affairs.

Although rendered in a factual vacuum, the court of appeals' decision has significant consequences. It requires the Secretary of the Interior to issue new regulations announcing as his own an interpretation of the ESA with which he strongly disagrees. And it places all federal agencies in the unseemly position of either disregarding that formal, judicially ordered interpretation, or risking serious injury to the Nation's foreign relations and foreign-aid programs by attempting to impose the rigid no-jeopardy standard in Section 7(a)(2) on foreign governments and following consultation procedures that are not tailored to this special setting. Review by this Court therefore is warranted.

A. Article III of the Constitution "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded," as well as "the proper—and properly limited—role of the courts in a democratic society." *Allen* v. *Wright*, 468 U.S. 737, 750 (1984). The limitations imposed by Article III's requirement of a "Case[]" or "Controvers[y]" are distilled in the core doctrine of standing. Under that doctrine, a plaintiff first must establish a personal injury-in-fact. The injury cannot be "abstract," "hypothetical," or "conjectural," *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974); *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-102 (1983); it must be "distinct and palpable." *Whitmore* v. *Arkansas*, 110 S. Ct. 1717, 1723 (1990). Only a plaintiff who identifies a concrete injury-in-fact has "'such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975). In addition, "the litigant must satisfy the 'causation' and 'redressability' prongs of the Art. III minima by showing that the injury 'fairly can be traced to the challenged action,' and 'is likely to be redressed by a favorable decision.'" *Whitmore* v. *Arkansas*, 110 S. Ct. at 1723 (quoting *Eastern Kentucky Welfare Rights*, 426 U.S. at 38, 41); see also *Allen* v. *Wright*, 468 U.S. at 751, 757-759.

Respondents satisfy none of these requirements: they have failed to prove any concrete injury, much less one that was caused by the Secretaries' interpretation of Section 7(a)(2) in their 1986 regulation or that would be redressed by a court-ordered revision of that interpretation. The court of appeals attempted to paper over this basic defect by focusing on two projects that it concluded "had not been subjected to the consultation requirement and would not be in the future if the new regulation remained in effect." App., *infra*, 7a. But this speculation about how projects not challenged in this liti-

gation might be affected by the Secretaries' interpretation cannot suffice to establish respondents' standing to bring the suit they did.

1. As an initial matter, even if those two projects were at issue in this case, Defenders would not have standing to challenge them. Joyce Kelly, a member of Defenders who visited Egypt in 1986, simply stated in her affidavit that she observed the habitat of the endangered Nile crocodile (although she did not claim actually to have seen any crocodiles), and that she intended to do so again (although she did not say when). Resp. C.A. App. 114. The court of appeals relied on Kelly's vague assertion (*ibid.*) that she would "suffer harm" as a result of the Aswan High Dam project. App., *infra*, 8a. But Defenders offered no proof that rehabilitating the Dam and repairing its generating works (see Resp. C.A. App. 82) would in fact be likely to jeopardize the continued existence of the Nile crocodile. *A fortiori*, Defenders did not prove that its members suffered harm that could fairly be traced to assistance rendered by the Bureau of Reclamation or to its failure to engage in formal consultation pursuant to Section 7(a)(2), and that any such harm would be remedied by consultation or the withdrawal of Bureau assistance.

Amy Skilbred, another member of Defenders, stated in her affidavit and deposition that she had traveled to Sri Lanka in 1981-1982 and visited, *inter alia*, the general area of the Mahaweli River project, although she did not see any evidence of the Project or know of its existence at the time and apparently did not observe any endangered or threatened species. Skilbred did state that she intended to go back to the Mahaweli Valley and hoped to see an endangered elephant and leopard (although she could not say when, especially in light of the civil war in Sri Lanka). Resp. C.A. Br. 169-171, 262-266, 269-270, 274. Moreover, although Skilbred asserted that the Mahaweli Project would seriously reduce the habitat of "endangered, threatened, and endemic species,"

she neither identified specific evidence that the Project would actually jeopardize the existence of any particular species nor tied her generalized assertions to discrete locations that she had visited or that are the sites of those portions of the Mahaweli Project receiving AID funds. Resp. C.A. App. 170-171, 265-266, 274. Nor did Skilbred or Defenders prove that any harm to endangered or threatened species that might result from the Project is fairly traceable to AID assistance (which amounted to only $170 million of an overall cost of $2.3 billion (Gov't C.A. App. 101)) or a failure by AID to engage in formal consultation with FWS under Section 7(a)(2), and that any such harm would be remedied by consultation or the termination of AID assistance. In fact, the record shows that even without the application of Section 7(a)(2), AID conducted an environmental assessment and actively assisted the Government of Sri Lanka in preventing harm to protected species in the Mahaweli Project area and conferred extensively (albeit informally) with FWS in doing so. App., *infra*, 47a; Gov't C.A. App. 28-32, 101.

In sum, Defenders did not show that past failures by action agencies to engage in formal consultation with FWS under Section 7(a)(2) had contributed to specific harm to its members' ability to view wildlife at the Aswan and Mahaweli Projects; and as to future harm, Defenders' two members simply expressed a general desire to return to those areas and a vague fear that an absence of consultation between the agencies concerned and FWS would cause harm. This showing would be wholly insufficient even if respondents had sought injunctive relief against the Bureau of Reclamation and AID requiring them to consult with FWS (or to withhold financial assistance from the Projects), since standing depends on injury that is "actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore* v. *Arkansas*, 110 S. Ct. at 1723.[3]

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[3] If such a claim of "injury" were sufficient, the plaintiffs in *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. 3177 (1990), could have ac-

2. Defenders did not, however, even seek relief against the two projects on which it relied in an effort to establish injury to its members. It instead sought to require the Secretary to rescind a non-binding regulation interpreting Section 7(a)(2) and to issue new regulations giving that Section a broader interpretation. This feature of the case further attenuates the elements of causation and redressability. As the regulations make clear (see page 4, *supra*), action agencies are ultimately responsible for making their own determinations about what is required of them under Section 7(a)(2), see also *National Wildlife Fed'n* v. *Coleman*, 529 F.2d 359, 371 (5th Cir.), cert. denied, 429 U.S. 979 (1976); *Sierra Club* v. *Froehlke*, 534 F.2d 1289, 1303 (8th Cir. 1976); cf. *TVA* v. *Hill*, 437 U.S. 153, 186 n.31 (1978), and those agencies would remain free as a legal matter to decide whether they will follow Section 7(a)(2)'s standards and procedures in connection with projects in foreign countries even if the regulation were changed, just as they were before.

Thus, in Administrative Procedure Act terminology, respondents are not "adversely affected" by the particular "agency action" (the interpretative regulation) they challenge. 5 U.S.C. 702; *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. at 3185-3186. To the extent respondents ever could show injury in APA and Article III terms, it would result only when a federal agency actually took action. As this Court emphasized in *Lujan* v. *National Wildlife Fed'n*, "[u]nder the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm." 110 S. Ct. at 3190.[4]

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quired standing simply by stating that their members intended, someday in the future, to visit all the land at issue in that case.

[4] The Court also reaffirmed in *Lujan* v. *National Wildlife Fed'n* that where, as here, there is no special statute authorizing immediate judicial review of regulations, a challenge to a regulation ordinarily is not ripe "until the scope of the controversy has been

Furthermore, the critical decisions regarding projects such as those cited by the court of appeals are not made by the action agencies of the United States Government; they are made by the respective foreign governments. The Mahaweli Project, for instance, involves twelve donors besides AID, which is furnishing less than 10% of the expected cost. Gov't C.A. App. 101. There could be no assurance that the Government of Sri Lanka would redesign or stop the Project even if AID threatened to terminate funding due to endangered species concerns raised during consultations with FWS. In such situations, host countries may simply turn to other donors that do not place restrictions on their funds. Thus, the causal connection between the challenged interpretative regulation and the asserted injury to Defenders' members is "highly indirect," hinging as it does on the independent actions of two sets of third parties not before the court; and the prospect of redress is correspondingly speculative. *Whitmore* v. *Arkansas*, 110 S. Ct. at 1725; *Allen* v. *Wright*, 468 U.S. at 757; *Eastern Kentucky Welfare Rights*, 426 U.S. at 42; *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. at 3190 & n.3.[5]

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reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." 110 S. Ct. at 3190. Here, respondents have not identified any concrete application of the interpretation reflected in the regulation that harms or threatens to harm them.

[5] Article III standing requirements must be enforced with particular scrupulosity in the present setting because of the potential for interference with the responsibilities of the political Branches for national defense and foreign relations. Respondents seek to affect the course of projects that are undertaken or approved by foreign sovereigns and that must be assumed by U.S. courts to be entirely proper under those sovereigns' own laws and international commitments. Moreover, respondents' claim of "injury" rests on alleged harm to wildlife that is wholly within the territorial and governmental jurisdiction of foreign sovereigns. In light of the intervening authority of the foreign sovereigns, it is especially clear that an asserted "injury" arising in such a wholly foreign context

3. The court of appeals tried to sidestep the lack of concrete injury by proclaiming that standing could rest on a "procedural injury" that allegedly arises from the failure by action agencies to engage in Section 7 consultation about overseas projects. App., *infra*, 10a-11a, 42a-44a. But there is no indication that the consultation provisions of Section 7 were intended to confer procedural rights on private groups such as respondents. Consultation takes place entirely between the relevant agencies, without any statutory provision for public input. See 16 U.S.C. 1536(b) and (c); 51 Fed. Reg. at 19,928. Section 7 therefore is unlike the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, in which some courts have found a public information purpose. See, *e.g.*, *Trustees for Alaska* v. *Hodel*, 806 F.2d 1378 (9th Cir. 1986).

Moreover, even under a statute like NEPA, some concrete interest, distinct from a "procedural" claim, is essential for Article III standing, because procedural protections exist only to secure substantive interests and therefore may be invoked only by persons having such interests. Accordingly, the three circuits that have recognized "procedural injury" as a basis for standing in suits raising NEPA claims have limited that theory to a litigant "having a sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences that the project may have." *City of Los Angeles* v. *NHTSA*, 912 F.2d 478, 492-493 (D.C. Cir. 1990) (quoting *City of Davis* v. *Coleman*, 521 F.2d 661, 671 (9th Cir. 1975)); see also *Friends of the Earth* v. *U.S. Navy*, 841 F.2d 927, 931-932 (9th Cir. 1988); *City of Evanston* v. *Regional Transp. Auth.*, 825 F.2d 1121, 1126 (7th Cir. 1987), cert. denied, 484 U.S. 1005 (1988); *South East Lake View* v. *HUD*, 685 F.2d 1027, 1039 (7th Cir. 1982). The Eighth Circuit's rejection of the "geograph-

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should not be a basis for invoking the jurisdiction of a U.S. court under U.S. law.

ical nexus" test (see App., *infra*, 10a-11a) squarely conflicts with these decisions.

Similarly, the court of appeals excused respondents' failure to show the causation and redressability required for standing by adopting respondents' view that Congress could simply "legislate[] the requisite causation and redressability" and had done so here by "determin[ing] that the remedy for the harm to the[] members' personal, professional, and aesthetic interest in endangered species is consultation between the Secretary and the action agency." App., *infra*, 49a-50a. There is no basis in the ESA for respondents' self-centered vision of Section 7(a)(2): that provision was designed to prevent harm to certain species of plants and animals, not to "remedy" injuries to the "interests" of human beings. In any event, the requirements of causation and redressability stem directly from Article III, *Whitmore* v. *Arkansas*, 110 S. Ct. at 1722-1723 & n.1; *Valley Forge*, 454 U.S. at 472, and hence cannot be waived by Congress. *Warth* v. *Seldin*, 422 U.S. at 501. The ESA citizen-suit provision, 16 U.S.C. 1540(g), upon which the court of appeals relied (App., *infra*, 10a), likewise cannot overcome standing deficiencies under Article III. See *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981) ("citizen suit provisions apply only to persons who can claim some sort of injury").[6]

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[6] In any event, the citizen-suit provision cannot be stretched to cover respondents' challenge in this case. That provision authorizes suits against any person "who is alleged to be in violation" of the ESA. 16 U.S.C. 1540(g)(1)(A). Section 7(a)(2) imposes the duties to consult and refrain from jeopardizing endangered or threatened species directly on the action agency. If the action agency fails to consult, it is that agency, not the Secretary, that has "violated" the ESA. Nor is the Secretary "in violation" of the ESA because he allegedly has given an incorrect interpretation to one of its provisions, especially since the ESA did not require the Secretary to interpret the geographic scope of Section 7(a)(2) in the first place. This suit instead is one challenging "agency action" (the regulation) under the APA.

4. The court of appeals' ruling is, at bottom, a holding that the Secretary's alleged misinterpretation of the ESA itself provides standing to challenge that interpretation by an organization having an historic interest in endangered species and the enforcement of the ESA. See App., *infra*, 10a, 43a. This result contravenes two bedrock Article III principles: "an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court," *Allen* v. *Wright*, 468 U.S. at 754, and an organization's longstanding interest in an environmental problem is not enough to confer standing, *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). And as this case vividly illustrates, the court of appeals' novel standing theories open the way for broad suits by organizations that have no concrete stake in the conduct of governmental programs, contrary to *Lujan* v. *National Wildlife Fed'n.* For these reasons, and in light of the conflict with decisions of other courts of appeals on the "procedural injury" point, the Court should grant review on the standing question.

B. 1. The abstract nature of respondents' challenge may have led the court below to overlook the far-reaching consequences of its interpretation of Section 7(a)(2). The duty to consult under that Section, on which the court of appeals focused, is only an adjunct of an agency's substantive duty to ensure that its actions are not likely to jeopardize the existence of endangered or threatened species. If the duty to consult applies to activities in foreign countries, then so does the duty to avoid jeopardy. The latter is one of the strictest environmental standards imposed on federal agencies. See *TVA* v. *Hill*, 437 U.S. 153, 172-174 (1978).

Even the consultation obligation can impose substantial burdens that would be inconsistent with the need for speed, flexibility and comity in the conduct of the Nation's activities abroad. The action agency must first obtain from the FWS or NMFS information about listed

species that may be present and then prepare, within 180 days, a "biological assessment" if the project is a "major construction activity." 16 U.S.C. 1536(c); 50 C.F.R. 402.12(b)(1). If the activity may affect listed species, formal consultation, resulting in the issuance of a "biological opinion" by the FWS or NMFS, then occurs over a subsequent 90-day period. 16 U.S.C. 1536(b); 50 C.F.R. 402.14. The agency must refrain during consultation from making an irreversible commitment of resources that would foreclose reasonable alternatives. 16 U.S.C. 1536(d).[7] An Act of Congress should not lightly be construed to extend such rigid standards and formal procedures to activities abroad. Cf. *United States* v. *Verdugo-Urquidez*, 110 S. Ct. 1056, 1065-1066 (1990).

For reasons such as these, Congress is assumed to be "primarily concerned with domestic conditions," and an Act of Congress therefore will be read not to apply to activities abroad unless a contrary intent appears. See, *e.g.*, *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285-286 (1949); *Argentine Republic* v. *Amerada Hess Shipping Co.*, 488 U.S. 428, 440-441 (1989). Other courts of appeals, in contrast to the decision below, have relied on that presumption in ruling against extraterritorial application of this Nation's environmental statutes. See *NRDC, Inc.* v. *NRC*, 647 F.2d 1345 (D.C. Cir. 1981) (holding NEPA inapplicable to export of nuclear reactor to Philippines); *United States* v. *Mitchell*, 553 F.2d 996, 1003-1004 (5th Cir. 1977) (holding Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq.*, inapplicable

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[7] If FWS or NMFS makes a finding of jeopardy, the action agency must decide "whether and in what manner to proceed with the action in light of its Section 7 obligations and the Service's biological opinion." 50 C.F.R. 402.15(a). The agency may disagree with the biological opinion, implement an alternative recommended by FWS or NMFS to avoid jeopardy, or seek an exemption, which can itself be a time-consuming process. 16 U.S.C. 1536(g).

within territorial waters of Bahamas); see also *Greenpeace USA* v. *Stone*, 748 F. Supp. 749, 758-759 (D. Haw. 1990) (rejecting NEPA challenge to Secretary of Defense's implementation of agreement with Federal Republic of Germany to remove obsolete chemical weapons from Germany), appeal dismissed as moot, No. 90-16260 (9th Cir. Feb. 5, 1991).

The court of appeals discounted that presumption here because the ESA "is directed at the actions of federal agencies, and not at the actions of sovereign nations." App., *infra*, 20a. But as this Court recently held, the mere fact that United States law imposes limitations on conduct by the Government does not mean that the law follows the Government abroad. *Verdugo-Urquidez*, *supra*. Moreover, as other courts of appeals have pointed out, conditioning assistance to a foreign nation on the basis of our own environmental standards "directs that nation's choices just about as effectively as a law whose explicit purpose is to compel foreign behavior," and will likely be seen by that nation as a "disguised way of substituting United States regulatory standards for the [foreign nation's] own." *NRDC, Inc.* v. *NRC*, 647 F.2d at 1356-1357 (opinion of Wilkey, J.); accord *United States* v. *Mitchell*, 553 F.2d at 1002 (different countries strike different balances between development and preservation, and the "traditional method of resolving such differences * * * is through negotiation and agreement rather than through the imposition of one particular choice by a state imposing its law extraterritorially"). Indeed, Congress is also presumed not to legislate in a way that would risk interference with the Executive Branch's conduct of foreign affairs. *Weinberger* v. *Rossi*, 456 U.S. 25, 31-32 (1982); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19 (1963); *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957); cf. *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-322 (1936).

2. There is no indication in the text or legislative history of the ESA that Congress intended to extend the duties imposed by Section 7(a)(2) to activities in foreign countries, much less the sort of clear expression of intent that would be needed to overcome these important considerations weighing against extraterritorial application here.[8]

a. As the text of Section 7(a)(2) makes clear, the purpose of consultation is to assist agencies in ensuring that their actions are not likely to "jeopardize the continued existence of any endangered or threatened species, or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical." The court of appeals recognized (App., *infra*, 12a-13a) that the use of such general phrases as "any action" and "any endangered species" in Section 7(a)(2) is insufficient in itself to extend its coverage to foreign countries, in light of the considerations weighing against extraterritorial application here. See *Foley Bros.*, 336 U.S. at 285 (statute requiring 8-hour day provision in "[e]very contract made to which the United States is a party" inapplicable to contracts for work performed in foreign country). Significantly, moreover, the only geographical reference in Section 7(a)(2) is the directive to the Secretary to consult with "affected States" before designating critical habitat. The lack of any requirement to consult with affected foreign nations is a strong indication that Congress was addressing domestic conditions. The court of appeals' response

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[8] Because application of Section 7(a)(2) would interfere with the activities of (and diplomatic dealings between) the United States Government and foreign governments—and because Congress separately addressed the conservation of species in foreign countries through other provisions of the ESA (see pages 25-27, *infra*)—this case is significantly different from *EEOC* v. *Arabian American Oil Co.*, No. 89-1838 (argued Jan. 16, 1991). There, we take the position that Title VII or the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, applies to discrimination by a U.S. employer against a U.S. national in a foreign country.

—that Congress intended extraterritorial application of Section 7(a)(2)'s protection for species but not its intimately related protection for their habitat (App., *infra*, 18a)—defies common sense.

The conclusion that Section 7 does not apply in foreign countries is confirmed by the exemption provisions in subsections (e)-(p), 16 U.S.C. 1536(e)-(p), added in 1978. Exemptions may be granted by an Endangered Species Committee consisting of the heads of six federal agencies and "one individual from each affected State." 16 U.S.C. 1536(e)(3). Similarly, the entities that may apply for an exemption are limited to the action agency, a permit or license applicant, and "the Governor of the State in which an agency action will occur, if any." 16 U.S.C. 1536(g)(1).[9] If Congress had contemplated that Section 7 would affect projects in foreign countries, it surely would have specified some role for a representative of the affected government, or at least the Secretary of State, in the process of granting exemptions from its rigid requirements. Moreover, to grant an exemption, the Committee must find that "the action is of regional or national significance," there are no "reasonable and prudent alternatives" to the action, the benefits of the action "clearly outweigh the benefits of alternative courses of action," and the action "is in the public interest." 16 U.S.C. 1536(h)(1)(A). Congress had domestic projects in mind when it devised these tests; indeed, it would be a significant intrusion upon the sovereignty of foreign nations to have the United States Government

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[9] Contrary to the court of appeals' speculation (App., *infra*, 19a), the phrase "if any" does not suggest that activities in foreign countries are covered. That phrase may simply assume coverage of activities on the high seas, in light of the responsibilities of the Secretary of Commerce for marine species. 16 U.S.C. 1532(15), 1536(e)(3)(F); 124 Cong. Rec. 21,563-21,564 (1978). Coverage of activities on the high seas does not present the same degree of foreign relations sensitivities that would arise from coverage of activities within the territories of foreign sovereigns.

unilaterally pass judgment on whether their projects are in the public interest and are preferable to alternatives.[10]

b. The court of appeals ultimately relied on *other* sections of the ESA in holding that Section 7(a)(2) applies to activities in foreign countries. App., *infra*, 13a-15a. But those provisions in fact confirm that Congress distinguished between the endangered species situation in the United States and that in foreign countries, and dealt with the latter by the accepted means of encouraging cooperative efforts between nations, rather than imposing this Nation's environmental standards abroad.

The congressional findings in paragraphs (1)-(3) of ESA Section 2(a) focus on species of fish, wildlife and plants "in the United States" that have been rendered extinct or depleted "as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. 1531(a)(1)-(3). There is no similar finding with regard to the effect of development in foreign nations, presumably because other nations may have different views about the proper balance between economic growth and environmental protection. Paragraph (4) of Section 2(a) notes that the United States "has pledged itself as a sovereign state in the international community to conserve to the extent prac-

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[10] Section 7(j) provides that the Committee "shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security." 16 U.S.C. 1536(j). To be meaningful in the foreign affairs area, a national security exemption would have to be invocable by the Secretary of State as well as by the Secretary of Defense. Furthermore, Section 7(j) apparently can only be invoked after the time-consuming consultation procedure has been completed and the Committee convened, 16 U.S.C. 1536(g), and no irreversible commitment of resources may be made during that time. 16 U.S.C. 1536(d). If Congress had intended Section 7 to apply in foreign countries, it presumably would have prescribed an exemption process tailored to the speed, flexibility, confidentiality, and comity that are necessary in the conduct of this Nation's foreign affairs.

ticable the various species of fish or wildlife and plants facing extinction," pursuant to treaties and international agreements. 16 U.S.C. 1531(a)(4). Thus, in the international sphere, Congress contemplated that measures would be taken cooperatively among "sovereign state[s]," each having jurisdiction within its own territory, and that, because of the different values and interests among nations, conservation would be accomplished only "to the extent practicable." 16 U.S.C. 1531(a)(4). Section 7(a)(2) is not tempered by such considerations of practicability and respect for national sovereignty.

Reflecting the approach envisaged by Section 2 of the ESA, Section 8, entitled "International cooperation," addresses conservation of species abroad by authorizing the President "to provide to any foreign country (with its consent) assistance in the development and management of programs * * * useful for the conservation of any endangered species or threatened species listed by the Secretary." 16 U.S.C. 1537(a). Section 8 further provides that the Secretary of the Interior, "through the Secretary of State," shall "encourage" foreign countries to conserve fish and wildlife and to enter into bilateral or multilateral agreements. 16 U.S.C. 1537(b). Congress also dealt with the protection of foreign species in Section 9 of the ESA, which makes it unlawful, *inter alia*, to "deliver, receive, carry, transport, or ship in interstate or foreign commerce" any endangered species. 16 U.S.C. 1538(a)(1)(E) and (a)(2)(C). But this substantive prohibition is carefully tailored to apply only to persons "subject to the jurisdiction of the United States," 16 U.S.C. 1538(a)(1) and (2), and the related prohibition on "takings" of endangered fish or wildlife is comparably limited to the United States, its territorial sea and the high seas. 16 U.S.C. 1538(a)(1)(B) & (C).

Because the ESA thus has both domestic and international components, it was necessary to provide for the listing of both domestic and foreign species. But in

doing so, Section 4, like Sections 8 and 9, is carefully tailored to accommodate the divergent interests and sensitivities of foreign nations by requiring the Secretary to take account of their efforts to protect species, 16 U.S.C. 1533(b)(1)(A), and to afford notice and an opportunity to comment to the foreign nation affected, 16 U.S.C. 1533(b)(5)(B). Section 7, by contrast, does not mention foreign nations and contains no provisions to consider and accommodate their interests and views. This reinforces the conclusion, already evident from references in Section 7(a)(2) itself to "affected States," that Congress did not intend *that* Section of the Act to have an extraterritorial reach.

c. The legislative history of Section 7 confirms its domestic orientation. References to Section 7 in the legislative history of the 1973 Act mention only domestic agency actions as being affected. See, *e.g.*, H.R. Rep. No. 412, 93d Cong., 1st Sess. 14 (1973) (Park Service actions in Yellowstone Park); 119 Cong. Rec. 42,913 (1973) (Air Force practice bombing in Texas); 119 Cong. Rec. 25,691-25,692 (1973) (Corps of Engineers road-building in Kentucky). By contrast, the goal of conserving foreign wildlife was discussed in terms of international cooperation, treaties, and restrictions on international trade in wildlife.[11]

The legislative history of the 1978 amendments is to the same effect. The Senate Report, for example, explained that the exemption procedure added by those amendments was "intended to provide a mechanism for the resolution of conflicts which might arise between the Endangered Species Act's mandate to protect and manage endangered and threatened species and other legitimate *national* goals and priorities such as providing

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[11] See S. Rep. No. 307, 93d Cong. 1st Sess. 5-6 (1973); H.R. Rep. No. 412, 93d Cong., 1st Sess. 6 (1973); 119 Cong. Rec. 25,670 (1973) (Sen. Tunney); *id.* at 25,693 (Sen. Domenici); *id.* at 25,676 (Sen. Williams); *id.* at 30,166 (Rep. Leggett); *id.* at 30,163 (Rep. Dingell).

energy, economic development and other benefits to the *American* people." S. Rep. No. 874, 95th Cong., 2d Sess. 2 (1978) (emphasis added). The floor debates on the exemption procedure likewise discuss the effect of Section 7 only in connection with projects in the United States.[12] Nothing in the legislative history remotely suggests an intent to extend Section 7 to activities overseas.[13]

d. Finally, the court of appeals plainly erred under *Chevron* by giving "no deference" to what is, at the very least, a reasonable administrative interpretation of Section 7(a)(2). App., *infra*, 15a; see 467 U.S. at 842-843. Even where, as here, an agency has changed its mind, "substantial deference is nonetheless appropriate if there appears to have been good reason for the change." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 355-356 (1989). Here, as in *Robertson*, the revision of the regulation came about "only after the prior regulation had been subjected to considerable criticism." *Id.* at 356. For one thing, the initial interpretation conflicted with the consistent administrative interpretation that the closely related critical-habitat provisions in the

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[12] See, *e.g.*, 124 Cong. Rec. 21,132 (1978) (Senator Culver); *id.* at 38,124 (Rep. Bowen); *id.* at 38,128 (Rep. Bevill); *id.* at 38,665 (Rep. Murphy).

[13] The court of appeals relied (App., *infra*, 16a-17a) on a statement in the Conference Report that the Senate version of the amendments, "by retaining existing law, was preferable [to the House version] since regulations governing section 7 are now familiar to most Federal agencies and have received substantial judicial interpretation." H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978). From this, the court inferred a "tacit approval" by Congress of the provision in the 1978 regulations that interpreted Section 7 as applying to projects in foreign countries. See page 2, *supra*. However, here, as in *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 603 (1991), "[t]here is no indication that Congress was aware of the administrative construction * * * at the time it revised the statute." See also *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979); *TVA* v. *Hill*, 437 U.S. at 192. The Conference Committee was focusing on an issue of procedure, not substance.

same sentence of Section 7(a)(2) do *not* apply in foreign countries. Moreover, as the Interior Department explained, the 1978 amendments to the ESA highlighted the "domestic orientation of the consultation and exemption processes," while the comments of other Departments made manifest "the potential for interference with the sovereignty of foreign nations" that would result from extraterritorial application. See pages 3-4, *supra*. There was, in short, "good reason for the change." *Robertson*, 490 U.S. at 356.

Furthermore, the interpretation now embodied in the regulations of the Secretary of the Interior and the Secretary of Commerce has been consistently and firmly adhered to throughout by the Executive Departments that are responsible for conducting the activities of the United States Government abroad, and it now represents the uniform view of the two Secretaries and those Departments. The court of appeals has cast that considered view and broad consensus aside. And in this most awkward of lawsuits, in which no Executive official except the Secretary of the Interior is before the court and no project affected by the interpretation of Section 7(a)(2) is even at issue, the court of appeals has sought to force every Department of the Executive Branch to acquiesce in the court's far different view of Section 7(a)(2)'s geographic reach. In light of the serious dilemma the decision below presents for the Departments concerned, and the serious consequences that may ensue in the conduct of the Nation's foreign affairs, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-5192
No. 89-5386

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT; AND THE HUMANE SOCIETY OF THE UNITED STATES, APPELLEES

v.

MANUEL LUJAN, as Secretary of the Interior,
APPELLANT

Appeals from the United States District Court
for the District of Minnesota

Submitted: May 17, 1990

Filed: August 10, 1990

Before JOHN R. GIBSON, Circuit Judge, BRIGHT, Senior Circuit Judge, and FAGG, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

The court again considers a challenge to a regulation promulgated by the Secretary of the Interior, Manuel Lujan, Jr., under the Endangered Species

Act, 16 U.S.C. §§ 1531-1544 (1988), which provides that federal agencies funding projects in foreign countries have no duty to consult with the Secretary about their projects' impact on endangered species. We earlier reversed the dismissal of this action brought by Defenders of Wildlife, Friends of Animals and Their Environment, and the Humane Society (collectively Defenders), and upon remand, the district court [1] held that Defenders had standing to bring this action and granted summary judgment on the merits in their favor. On appeal, the Secretary argues that the court erred in holding both that Defenders had standing and that Congress intended for the Endangered Species Act to apply to projects in foreign countries. We affirm the order of the district court.

Congress declared in the Endangered Species Act that "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction." 16 U.S.C. § 1531(a)(4). Toward this purpose, the Act requires each federal agency to consult with the Secretary to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." *Id.* § 1536(a)(2). After consultation, the Secretary must issue a written opinion to the agency describing how the proposed agency action would affect the endangered species or critical habitat. The Secretary must also suggest reasonable alternatives

[1] The Honorable Donald D. Alsop, Chief Judge for the United States District Court for the District of Minnesota.

if the agency action would jeopardize the existence of the species or habitat. *Id.* § 1536(b)(3)(A).

Defenders brought this action to challenge a new regulation promulgated by the Secretary which limits the consultation obligation to agency action "in the United States or upon the high seas." 50 C.F.R. § 402.01 (1986). The new regulation defines "action" as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas." *Id.* § 402.02. This new regulation replaced a regulation which required agencies to consult with the Secretary concerning actions in foreign countries. *See* 50 C.F.R. § 402.04 (1978).

The Secretary moved to dismiss for lack of subject-matter jurisdiction on the basis that Defenders lacked standing to bring the action. The district court granted the motion. 658 F. Supp. 43 (D. Minn. 1987). On appeal, this court reversed and remanded because we held that Defenders had standing to challenge the regulation. 851 F.2d 1035 (8th Cir. 1988). Upon remand, after further discovery on standing, including filing additional affidavits and deposing the affiants, the district court granted Defenders' motion for summary judgment on the issue of whether the Act requires agencies to consult with the Secretary on projects in foreign countries. 707 F. Supp. 1082 (D. Minn. 1989). The court found that both the Act's plain language and its legislative history supported the court's conclusion that the consultation duty extended to foreign projects. *Id.* at 1084-86. The court ordered the Secretary to revoke and rescind the portion of the regulation limiting the consultation duty to agency actions in the United States or upon the high seas, and to publish proposed regulations clearly

recognizing that the consultation duty applies to agency actions affecting endangered species wherever found. *Id.* at 1086. This appeal followed.

I.

The Secretary first argues that our earlier decision, which held that Defenders' allegations concerning standing were sufficient to withstand a motion to dismiss, did not relieve Defenders of the burden of proving standing at the summary judgment phase of the litigation. They argue that Defenders lacked standing because it could not show that the organization or its members were in fact injured by the new regulation. According to the Secretary, no member of Defenders actually used the area around any foreign projects being funded by the United States.

Our examination of the standing issue is guided by the following fundamental principle:

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to [1] "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and [2] that the injury "fairly can be traced to the challenged action" and [3] "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 472 (1982). The standing requirement "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating

society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id.*

We address only the first requirement, injury in fact, because the Secretary does not contend that the traceability and redressability requirements are not met. In the earlier appeal to this court, we extensively discussed the standing issue and concluded that Defenders had sufficiently alleged injury in fact on two grounds. First, Defenders had alleged a substantive injury because the rate of extinction of endangered species was increasing in foreign countries which its members had visited to observe wildlife and which were the site of specific agency projects. 851 F.2d at 1040. Second, Defenders had alleged a procedural injury resulting from the Secretary's refusal to carry out statutorily-mandated procedures. *Id.* at 1040-41. Other courts of appeals have also recognized that failure to comply with required procedures may constitute injury in fact. *See, e.g., National Wildlife Fed'n v. Hodel*, 839 F.2d 694, 712 (D.C. Cir. 1988); *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 428 (1st Cir. 1983); *South East Lake View Neighbors v. Department of Housing & Urban Dev.*, 685 F. d 1027, 1038-39 (7th Cir. 1982); *City of Davis v. Coleman*, 521 F.2d 661, 670-72 (9th Cir. 1975).

Upon remand to the district court, the Secretary again raised the standing issue, this time in its motion for summary judgment. The Secretary argued that Defenders bore a greater burden in proving standing at the summary judgment stage than it did when responding to the motion to dismiss, and insisted that Defenders had failed to carry this burden. The district court dealt with this argument as follows: "Although the court appreciates the distinction

urged by the Secretary, it feels that the Eighth Circuit has already determined the standing question in this case. The new 'proof' and arguments offered by the Secretary do not vary the situation enough to merit an analysis differing from that given by the Eighth Circuit." 707 F. Supp. at 1083-84. The district court expressly denied summary judgment to the Secretary on the standing issue and, in granting summary judgment in favor of Defenders on the merits, necessarily determined, as a matter of law, the threshold issue of standing in favor of Defenders. It is, of course, "within the court's power to grant summary judgment sua sponte against the moving party, lacking a cross-motion, where the party against whom the judgment is entered has had a full and fair opportunity to contest that there are no genuine issues of material fact to be tried and the party granted judgment is entitled to it as a matter of law." *Burlington N. R.R. v. Omaha Pub. Power Dist.*, 888 F.2d 1228, 1231 n.3 (8th Cir. 1989). We review this issue under the standard for summary judgment set forth in Rule 56 of the Federal Rules of Civil Procedure. Defenders had the burden of showing "that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). *See Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3186 (1990).

The Secretary correctly states that a court's refusal to dismiss an action for lack of standing does not relieve the plaintiff of the burden of actually proving standing where a defendant contests the factual basis for standing. *See National Wildlife Fed'n*, 110 S.Ct. at 3189; *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 (1979); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976); *Munoz-Mendoza*, 711 F.2d at 425; *Glover River. Org. v. United States Dep't of the Interior*, 675 F.2d 251,

254 n.3 (10th Cir. 1982). We are satisfied, however, that Defenders had met its burden of proving standing at the summary judgment phase of the litigation. The district court did not merely reiterate our earlier analysis of the standing issue. It stated that it appreciated the distinction urged by the Secretary and recognized that "plaintiffs must prove their standing without the benefit of any inferences in their favor," 707 F. Supp. at 1083. In contrast, Defenders received the benefit of all favorable inferences when both this court and the court below considered the motion to dismiss. After remand, the court did not merely consider the bare allegations in the complaint but reexamined the evidence initially offered, the new evidence, and the record as a whole. The court concluded that the new evidence had not significantly changed the situation from that which we considered in the earlier appeal and thus, that Defenders had established standing.

Our own review of the record supports this conclusion. The affidavits of several Defenders' members established that they had visited, and planned to visit again, the endangered species or their habitat in the areas that may be affected by specific agency projects. In our earlier opinion, we noted that "[a]n interest in aesthetic, conservational, and recreational values will support standing when an organizational plaintiff alleges that its members use the area and will be adversely affected." 851 F.2d at 1040; *see also United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 (1973). In the prior appeal, we identified several foreign projects that had not been subjected to the consultation requirement and would not be in the future if the new regulation remained in effect. Amy Skilbred, a

member of Defenders, stated in her sworn affidavit that she had visited Sri Lanka in order to observe its wildlife and animal habitat, and that she intended to return in the future for the same purpose. She stated that she would be harmed by the Mahaweli project in Sri Lanka, funded by the federal Agency for International Development (AID), because of its impact on wildlife. (Appellees' App. I at 169-71). In her deposition testimony, she also described her wildlife viewing activities in Sri Lanka, stated that she had visited the Mahaweli project, and expressed her intent to return to that area to view wildlife. *Id.* at 262-66.

Joyce Kelly, president of Defenders, stated in her sworn affidavit that she had visited Egypt and that she would suffer harm because of the Bureau of Reclamation's Aswan High Dam project. She expressed the intent to return to the area in the future. *Id.* at 114.

The Secretary offered additional evidence on the standing issue to the district court at the time of the parties' cross-motions for summary judgment. The court found that the proffered evidence was insufficiently probative to merit a conclusion other than that Defenders had standing. We agree because, as the court below observed, any dispute over a fact must be both material and genuine in order to defeat summary judgment. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). We believe that the evidence raises no genuine issue of material fact concerning whether Defenders has suffered an injury in fact. We are aware of the Supreme Court's recent opinion in *Lujan v. National Wildlife Fed'n* and we believe that the evidence offered to support standing here meets the requirements of Rule 56, unlike that offered in *National Wildlife Fed'n*. Defenders has pro-

vided specific facts, as opposed to claiming use of unspecified portions of immense tracts of land upon which the governmental activity may or may not occur, as was the case in *National Wildlife Fed'n*. *See* 110 S.Ct. at 3187-89.[2]

Furthermore, Defenders has also satisfied the standing requirement by demonstrating a procedural injury based upon the Secretary's failure to follow the required consultation procedure. Defenders has set forth specific facts adequate to show procedural injury, has established that the benefits flowing from the procedures in issue are an objective of the stat-

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[2] In *National Wildlife Fed'n*, the Supreme Court held that the allegations in the Peterson affidavit claiming use of land "in the vicinity of South Pass-Green Mountain, Wyoming," were insufficient to defeat summary judgment on standing. 110 S.Ct. at 3187, 3189. This claim was not specific enough because only 4500 acres of the two million acre area were affected by the challenged action. *Id.* at 3187-88. The Erman affidavit was similarly deficient because it claimed use of land "in the vicinity" of the Grand Canyon, the Arizona Strip, and the Kaibab National Forest. *Id.* at 3187. Of the 5.5 million acres of the Arizona Strip, only one-third were actually affected by the challenged action. *Id.* at 3188.

In contrast, the evidence here specifically identified the land areas visited which were the sites of the challenged agency projects. Skilbred stated that she visited the Mahaweli Project site in Sri Lanka and later confirmed that she was at that site by examining the AID Environmental Assessment. (Appellees' App. I at 269-70). Kelly stated that she had observed the traditional habitat of the Nile crocodile at the Aswan High Dam project in Egypt. *Id.* at 114.

We believe that the testimony of J. Campbell Plowden in this case was insufficient, standing alone, to demonstrate standing for the same reason that the affidavits in *National Wildlife Fed'n* were insufficient. The evidence showed that Plowden came only within several hundred miles of the Picchis-Palcazu project in Peru. (Appellants' App. at 126).

ute, and has identified the agency action which is the source of its injuries, as required by *National Wildlife Fed'n*, *id.* at 3194. The Secretary argues, based upon *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975), that Defenders must prove a "geographical nexus" to the project sites in order to establish a procedural injury. *Id.* at 671. We reject this contention. Subsequent to *City of Davis*, the Ninth Circuit has decided cases which indicate that the geographical nexus test is not determinative. "In determining whether a given statutory duty creates a correlative procedural right, we look to the statutory language, the statutory purpose, and the legislative history." *Fernandez v. Brock*, 840 F.2d 622, 630 (9th Cir. 1988); *see also Dellums v. Smith*, 797 F.2d 817, 821 (9th Cir. 1986). When we apply the Ninth Circuit's procedural injury analysis here, we are persuaded that the Act is a statute imposing statutory duties which create "correlative procedural rights in a given plaintiff, the invasion of which is sufficient to satisfy the requirement of injury in fact in article III. *Fernandez*, 840 F.2d at 630.

As we observed in our earlier opinion, the Act "provides that 'any person' may commence a suit to enjoin any person who is alleged to be in violation of the ESA. *See* 16 U.S.C. § 1540(g). Environmental associations are 'persons' and may bring suit in their own name." *Defenders*, 851 F.2d at 1039. The Act's ambitious purpose also supports a construction that Congress intended to bestow procedural rights upon environmental organizations such as Defenders. "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (em-

phasis added). The legislative history of the Act, which we will discuss in more detail when addressing the merits of the action before us, similarly supports this construction. "[T]he plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as 'incalculable.'" *Id.* at 187. The Supreme Court also declared that "[t]he pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Id.* at 185.

In sum, we are satisfied that, based upon the Defenders' evidence of both substantive and procedural injury, it has established standing sufficiently to survice both a motion to dismiss and to prevail on summary judgment.

II.

Having dealt with the threshold issue of standing, we now turn to the Secretary's argument that the language and legislative history of the Act show that Congress did not intend for the consultation requirement to apply to projects funded by the United States in foreign countries. The parties disagree as to whether the Secretary's interpretation of the Act, as revealed through its promulgation of the regulation at issue here, is entitled to deference by this court. The Supreme Court has spoken definitively on this issue:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of

> Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A. v. Natural Resources Def. Council, 467 U.S. 837, 842-43 (1984) (footnotes omitted). Thus, we first examine the words of the Act itself in search of clearly expressed congressional intent.

The statute upon which the challenged regulation is based provides:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species. . . .

16 U.S.C. § 1536(a)(2). It cannot be denied that Congress has chosen expansive language which admits to no exceptions. Reduced to its simplest form, the statute clearly states that *each* federal agency must consult with the Secretary regarding *any* action to insure that such action is not likely to jeopardize the existence of *any* endangered species. We recog-

nize, however, that the use of all-inclusive language in this particular section of the Act is not determinative of the issue. *See Foley Bros. v. Filardo*, 336 U.S. 281, 287-88 (1949); *United States v. Mitchell*, 553 F.2d 996, 1003-04 (5th Cir. 1977). We must search the Act further for clear expression of congressional intent.

The Supreme Court extensively discussed the Act's ambitious purpose in *Tennessee Valley Authority v. Hill*. "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, *but in literally every section of the statute*." 437 U.S. at 184 (emphasis added). The Court described the Act as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Id.* at 180.

In the Act, Congress declared that "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction." 16 U.S.C. § 1531(a)(4). The Act lists various international agreements which guide this pledge. *Id.* Congress also committed itself to meeting the international commitments of the United States to existing conservation programs. *Id.* § 1531(a)(5). The Act further declares one of its purposes is to take the appropriate steps to achieve the purposes of the international treaties and conventions just mentioned. *Id.* § 1531(b).

The Act defines "endangered species" broadly and without geographic limitations. *See id.* § 1532(6). Furthermore, the Act sets out a detailed procedure for determining whether a species is endangered. *Id.*

§ 1533. This section states that the Secretary shall determine whether a species is endangered or threatened after taking into account "those efforts, if any, being made by any State or foreign nation . . . to protect such species." *Id.* § 1533(b)(1)(A). The Secretary is instructed to give consideration to species which have been designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement, and species identified as in danger of extinction by any State agency or by any agency of a foreign nation. *Id.* § 1533(b)(1)(B)(i), (ii). Moreover, the Secretary is required to give actual notice to and invite comment from each foreign nation in which species proposed for listing as endangered are found. *Id.* § 1533(b)(5)(B).

The Secretary is instructed to publish a list of all species found to be threatened. *Id.* § 1533(c). Defenders asserts, and the Secretary does not contest, that "[a]s of May 1989, of 1,046 species listed as endangered or threatened, 507 were species whose range is outside the United States. In addition, there are 71 listed species whose range includes both United States and foreign territory." (Appellee's Brief at 4). The listing process does not distinguish between domestic and foreign species.

The Act contains a section entitled "International Cooperation" which declares that the United States' commitment to worldwide protection of endangered species will be backed by financial assistance, personnel assignments, investigations, and by encouraging foreign nations to develop their own conservation programs. 16 U.S.C. § 1537. While the Secretary argues that this section and section 1538, dealing with imports and exports of wildlife, embody Congress' com-

plete response to the international problem of endangered species, we are persuaded that this provision cannot be so neatly excised from the larger statutory scheme. Rather, we believe that the Act, viewed as a whole, clearly demonstrates congressional commitment to worldwide conservation efforts. To limit the consultation duty in a manner which protects only domestic endangered species runs contrary to such a commitment.

Based upon the foreging examination of the Act as a whole, we are convinced that congressional intent can be gleaned from the plain language of the Act. Accordingly, we owe no deference to the Secretary's construction of the Act. *See Chevron*, 467 U.S. at 842-43. Furthermore, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. *Id.* at 843 n.9.

We believe that the answer to the extraterritorial issue can be found in the plain words of the statute. Our examination of the statute's legislative history, however, also reinforces our conclusion.

The original Environmental Species Act was enacted in 1973. Soon thereafter, the Secretary initiated a rulemaking process in order to implement the Act. In regard to the consultation requirement at issue here, the Secretary solicited comments from various agencies. Several agencies, including the Army Corps of Engineers, the State Department, and the Defense Department, expressed opposition to extraterritorial application. (Appellants' App. at 44-45, 52). The Council on Environmental Quality, the Interior Department Solicitor's Office, and the General Counsel's Office of the National Oceanic and Atmospheric Administration, however, took the posi-

tion that the consultation duty extended to foreign countries. (Appellees' App. I at 53, Appellants' App. at 19, 21). After considering the extensive commentary, the Secretary concluded that Congress intended the duty to extend beyond the United States, and published a final rule on January 4, 1978, providing that:

> Section 7 . . . requires every Federal agency to insure that its activities or programs in the United States, upon the high seas, and *in foreign countries*, will not jeopardize the continued existence of a listed species.

42 Fed. Reg. at 4871 (1978) (emphasis added). At that time, the Secretary justified the extraterritorial application by stressing the Act's broad, inclusive language; its legislative history; and its policy implications. *See* Appellants' App. at 21-25.

After these regulations were issued, Congress amended the consultation section of the Act to reflect its present version. The amendment was essentially a reorganization to allow additions to the rest of the section. The conference report to these 1978 amendments indicates that no substantive changes were intended:

> The conferees adopted Senate language creating a new section 7(a), which essentially restates section 7 of existing law, and outlines the responsibilities of the Secretary and other Federal agencies for protecting endangered species. . . . The Conferees felt that the Senate provision *by retaining existing law*, was preferable since regulations governing section 7 are now familiar to most Federal agencies and have received substantial judicial interpretation.

H.R. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 9453, 9486 (emphasis added); *see also Sierra Club v. Clark*, 755 F.2d 608, 615 (8th Cir. 1985) (stating that the Conference Report is an authoritative source of congressional intent). In light of the fact that the "existing law" at the time of the 1978 amendments included the prior regulation requiring consultation on foreign projects, we believe that the above language provides strong evidence of the conference committee's tacit approval of the prior regulation. The Secretary relies upon *Securities & Exchange Commission v. Sloan*, 436 U.S. 103 (1978), for the proposition that we should be "extremely hesitant to presume general congressional awareness" of agency practices, based upon "a few isolated statements in the thousands of pages of legislative documents." *Id.* at 121. In light of the extensive commentary made by numerous agencies on the issue, however, we believe that it is highly unlikely that Congress was unaware of this state of the law.

Despite this evidence of congressional intent, in 1983, the Secretary issued a notice of proposed rulemaking to revise the regulation. The proposed regulation eliminated the need for consultation on foreign projects and defined "action" to exclude foreign activities. The Secretary attributed its radical shift on extraterritorial application to "the apparent domestic orientation of the consultation and exemption processes resulting from the [1978] Amendments, and because of the potential for interference with the sovereignty of foreign nations." (Appellants' App. at 84).

We are compelled to reject this justification. We recognize that "[a]n administrative agency is not disqualified from changing its mind," *NLRB v. Local*

Union No. 103, Int'l Ass'n of Iron Workers, 434 U.S. 335, 351 (1978), and that "substantial deference is nonetheless appropriate if there appears to have been good reason for the change," *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1848 (1989). In this situation, however, the reasons offered for the change fall far short when examined in the context of the Act's language and legislative history previously discussed.

The Secretary places great emphasis upon the Act's treatment of the critical habitat clause, 16 U.S.C. § 1536(a)(2), as support for its position. According to the Secretary, Congress could not have intended that the critical habitat provisions apply only to domestic projects while the consultation requirement extends to foreign projects. We are not persuaded. The Act reveals an intent to separately address the concerns raised by critical habitats and endangered species. The designation of critical habitat is governed by different procedures and standards than the listing of endangered species. *See id.* § 1533(b)(2). Furthermore, we observe that the Secretary was not troubled by this alleged inconsistency when it promulgated its earlier regulation permitting differing geographic scopes of the two concerns. The evidence reveals that the consultation requirement and the critical habitat designation have been viewed as severable as to their geographical scope. *See* Appellants' App. at 18.

The Secretary claims that the domestic orientation of the consultation requirement is shown by the exemption provision, 16 U.S.C. § 1536(e)-(p), added by the 1978 amendments. Specifically, the Secretary points out that exemptions are granted only if "the action is of regional or national significance," *id.* § 1536(h)(1)(A)(iii), and require the weighing of

public interests, *id.* § 1536(h)(1)(A)(ii), which would be a gross intrusion upon the sovereignty of foreign nations. Again, we are unpersuaded. The exemption clauses provide that "the Governor of the State in which an agency action will occur, *if any*, . . . may apply to the Secretary for an exemption." *Id.* § 1536(g)(1); *see also* (g)(2)(B)(1)(i) (emphasis added). This language, when considered with the substantive and persuasive evidence previously discussed, leads us to conclude that the exemption provisions do not limit the consultation requirement geographically. The Secretary also identifies other provisions of the Act which purportedly limit the consultation duty. We have carefully considered these arguments and believe that they do not compel a different result here. They merit no further discussion.

To support its construction of the Act, the Secretary relies heavily upon the canon of statutory construction that statutes are presumed to have domestic scope only. *See Foley Bros.*, 336 U.S. at 285. To overcome the presumption that the statute was not intended to have extraterritorial application, there must be clear expression of such congressional intent. *United States v. Mitchell*, 553 F.2d at 1003. We are convinced that evidence of such intent is found both in the words of the Act and in its legislative history as previously set forth. This evidence leaves us with the belief that Congress intended for the consultation obligation to extend to all agency actions affecting endangered species, whether within the United States or abroad.

The Secretary also expresses concerns about the impact on foreign relations stemming from extraterritorial application of the consultation duty. It urges

that such a construction would be viewed as an intrusion upon the sovereign right of foreign nations to strike their own balance between development of natural resources and protection of endangered species. We note initially that the Act is directed at the actions of federal agencies, and not at the actions of sovereign nations. Congress may decide that its concern for foreign relations outweighs its concern for foreign wildlife; we, however, will not make such a decision on its behalf.

III.

The Secretary argues that we should also reverse the district court's award of attorney fees to Defenders if we reverse the court's holding on standing or the merits. The district court was authorized to award attorney fees pursuant to 16 U.S.C. § 1540 (g)(4). As we affirm the court's decision in all respects, we need not consider the Secretary's argument on the award of attorney fees.

IV.

In conclusion, we affirm the district court's holding that Defenders had standing to challenge this regulation as contrary to congressional intent. We also affirm the court's holding that Congress intended that the Act's consultation requirement apply to projects in foreign nations, as well as to projects in the United States and upon the high seas. Accordingly, we also affirm the court's award of attorney fees to Defenders.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-86-CV 757

DEFENDERS OF THE WILDLIFE,
FRIENDS OF ANIMALS AND THEIR ENVIRONMENT,
and THE HUMANE SOCIETY OF THE UNITED STATES,
PLAINTIFFS

v.

DONALD P. HODEL, as Secretary of the Interior,
DEFENDANTS

ORDER

[Filed Feb. 15, 1989]

I. BACKGROUND

Plaintiffs ("Defenders") filed this action on August 27, 1986. The complaint challenged the defendant's issuance of Regulations in 1986 which limited the "consultation provision"[1] of the Endangered Species Act[2] ("ESA") to those actions occurring in the United States or on the high seas. Previously, 50 C.F.R. § 402.02 had stated that consultation was required for any agency action, foreign or domestic. On February 25, 1987, this court dismisesd Defenders' action on the grounds that it had no subject matter jurisdiction because the plaintiffs lacked standing. The Eighth Circuit Court of Appeals reversed that order on July 8, 1988. The Secretary petitioned the Eighth Circuit for a rehearing and rehearing *en banc*, which petition was denied, and the case has been remanded to this court for further proceedings.

The parties come before the court now on cross motions for summary judgment. The court is asked to make two decisions at the present time. First, the Secretary asks the court to reexamine the issue of plaintiffs' standing. He argues that the standing determination reached by the Eighth Circuit was made in the context of a motion to dismiss, where all factual allegations were construed in a light favorable to plaintiffs. Now, a "new level" of litigation has been reached. The present motion is in the context of summary judgment. At this stage, the plaintiffs must prove their standing without the benefit of any inferences in their favor. The Secretary argues that the depositions taken of the plaintiffs prove that no

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[1] 16 U.S.C. § 1536(a)(2).

[2] 16 U.S.C. §§ 1531-1543 (1982).

member of the plaintiff groups will be injured by the new regulations, therefore, they have no standing. Plaintiffs, on the other hand, argue that they do have standing and that the opinion of the Eighth Circuit confirms that fact.

The second issue for determination is whether the 1986 regulations are invalid because they contradict the Endangered Species Act.[3] The 1986 regulations define an agency "action" so that federal agency action in foreign countries is no longer subject to the consultation requirements found in section 1536. Defenders argues that the ESA is clear in that the consultation requirements found at section 1536 apply to federal agency action throughout the world. Consequently, any regulations which stray from the statute's mandate are invalid.

II. STANDARD FOR SUMMARY JUDGMENT

The Supreme Court has stated that summary judgment is a tool to isolate and dispose of claims or defenses which are either factually unsupported or which are based on undisputed facts. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986); *Hegg v. United States*, 817 F.2d 1328, 1331 (8th Cir. 1987). Summary judgment is proper, however, only if examination of the evidence in a light most favorable to the non-moving party reveals no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

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[3] Plaintiffs have also moved for summary judgment on the grounds that the Secretary's decision was arbitrary and capricious. That issue will not be discussed due to the disposition of plaintiffs' first cause of action.

The test for whether there is a genuine issue over a material fact is two-fold. First, the materiality of a fact is determined from the substantive law governing the claim. Only disputes over facts that might affect the outcome of the suit are relevant on summary judgment. *Liberty Lobby*, 477 U.S. at 252; *St. Amant v. Benoit*, 806 F.2d 1294, 1297 (5th Cir. 1987). Second, any dispute over material fact must be "genuine." A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party. *Liberty Lobby*, 477 U.S. at 252. It is the non-moving party's burden to demonstrate that there is evidence to support each essential element of his claim. *Celotex*, 477 U.S. at 324.

Any discovery in this case pertaining to the present motions has been completed. Defenders' motion is a question of statutory interpretation and a matter of law for the court to decide. As to the facts regarding standing, although the parties have different interpretations regarding the facts, there is no dispute as to what those facts are. Summary judgment is, therefore, appropriate at this time.

III. STANDING MOTION.

As stated above, the Secretary argues that at this stage of the proceedings the plaintiffs bear a greater burden in providing standing than they did in the motion to dismiss, and have failed to carry that burden. Although the court appreciates the distinction urged by the Secretary, it feels that the Eighth Circuit has already determined the standing question in this case. The new "proof" and arguments offered by the Secretary do not vary the situation enough to merit an analysis differing from that given by the

Eighth Circuit. The court will, therefore, deny the Secretary's motion for summary judgment.

IV. ENDANGERED SPECIES ACT DISCUSSION

The consultation provision states that:

> Each federal agency shall, in consultation with and with the assistance of the Secretary, ensure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species . . .

16 U.S.C. § 1536(a)(2) (1982).

The Secretary argues that the 1986 regulations are perfectly consistent with this language. He also argues that the 1986 definition of "action" is supported by the presumption against the extraterritorial application of United States statutes,[4] congressional and agency comments regarding the proper scope of the provision, and the fact that other statutes and other sections of the ESA more specifically deal with the international endangered species problem.

The Secretary's strongest argument is that statutes are presumed to have domestic scope only. This presumption of domestic application finds expression most clearly in an environmental case in *United*

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[4] The court assumes that the consultation provision can be classified as a statute with extraterritorial reach. Defenders has argued that it is merely a statute involving United States agencies spending United States money. *Plaintiffs' Reply Memorandum* at 3, n. 4. Because this difference in terminology does not control the outcome, the court expresses no opinion in regard to the technical "categorization" of the statute.

States v. Mitchell, 553 F.2d 996 (5th Cir. 1977). That case stands for the proposition that if environmental legislation is to be applied outside the boundaries of the United States, Congress' intent that the legislation be applied to that extent must be clearly expressed. One of the teachings of *Mitchell* is that the use of all-inclusive language, by itself, is not enough to provide that specific and clear direction. *Id.* at 1003.

The starting point for any question of statutory interpretation must be the words of the statute itself. If the language of the statute is plain and clear, that language is ordinarily regarded as conclusive. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982); *Sierra Club v. Clark*, 755 F.2d 608, 613 (8th Cir. 1985). The other methods of statutory interpretation come into play only if the statute itself is ambiguous. They are not used to cast doubt on the meaning of a statute which is clear on its face.[5]

The court finds that the ESA plainly states that federal agencies are required to consult with the Secretary regarding projects in foreign countries. Congress' clear intent that this is so can, for the most

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[5] Both parties have cited comments in support of their position uttered by various committees or agencies from periods before and after the ESA was passed. The court tends to the view that "[t]he fact of the matter is that legislative history can be cited to support almost any proposition, and frequently is." *Wallace v. Christensen*, 802 F.2d 1539, 1559 (9th Cir. 1986) (Kozinski, J., concurring). For the most part, the statements cited by the parties prove only that there was a difference of opinion among the various government branches and agencies. The court is of the impression that such comments reflect individual opinion and agency infighting more than anything else, and accords very little weight to such comments cited by either side.

part, be determined without resort to legislative history. Section 1536 clearly states that each federal agency must consult with the Secretary regarding any action which could jeopardize any endangered or threatened species. The language and mandate is all inclusive; it could not be more broad. Consultation must occur whenever an action endangers *any endangered species*. Endangered species exist outside the boundaries of the United States and high seas,[6] therefore, consultation must occur if an action in a foreign land affects an endangered or threatened species there.[7]

The court has made this determination well aware of the *Mitchell* holding that congressional intent to apply a statute extraterritorially must go beyond the use of inclusive language. The court finds that additional intent in several places. First, Congress' concern with the international aspects of the endangered species problem is unmistakable and appears repeat-

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[6] Although the court has not counted numbers, Defenders stated that 493 of the 883 species listed as endangered in 1986 had their primary range outside the United States.

[7] By coming to this conclusion, the court expresses no views as to the "best" or most diplomatic way of dealing with the preservation of endangered species in other countries, or how international relations regarding this issue should be structured. There are no doubt several ways these objectives could be realized, as evidenced by the beliefs of the Secretary and other individuals that the 1986 regulations best balance all concerns presented by this probelm. However, in section 1536, Congress has declared one way all federal agencies must respond to the problem. That congressional mandate cannot be subverted by the Secretary's redefinition of what "action" means. Congress required that consultation be given regarding actions in foreign countries. If that requirement is to be changed, it must be changed by Congress, not the Secretary.

edly throughout the statute. Section 1531 states that the United States has pledged itself to conserve, to the extent practicable, wildlife throughout the world. Section 1532(6) defines "endangered species" without regard to their presence in the United States. Section 1537 specifically deals with "international cooperation" regarding endangered species, and section 1538 (a) prohibits various actions, wherever occurring, by anyone subject to the jurisdiction of the United States. Section 1538 also shows that Congress knew that not *all* portions of the ESA were to apply worldwide. Where they did not want the prohibitions to have effect outside the United States, inclusive language was not used. Section 1536's all-inclusive language, when contrasted with the discriminatory language of section 1538, cannot be considered sloppiness on the part of Congress, but, rather, intentional language expressing a concern that the consultation provisions be given effect wherever agency action took place.

In addition to this "general" international concerns of the statute noted above, section 1533 requires the Secretary to list all species that are determined to be endangered or threatened. That section clearly states that the actions of *foreign nations* are to be considered in determining which species to list, and many species not native to or present in the United States appear on the list. *See* 50 C.F.R. Part 17. This broad definition of "endangered species," combined with the general international concern of the entire ESA, must be considered in interpreting the consultation requirements of section 1536.

Finally, the court finds Congressional intent to apply the statute extraterritorially in the interplay between the statute and federal regulations which

occurred during the 1978 amendments to section 1536. This interplay is the one piece of legislative history helpful to the resolution of the present controversy.

To gain perspective on the 1978 amendment, it is necessary to step back. The original ESA was passed in 1973. As a response to this, the Secretary of the Interior initiated a rule-making process to fully implement the Act. The consultation provision of section 7 (section 1536) was subject to considerable discussion and the Secretary published final rules for this provision on January 4, 1978. The final rules stated that section 7 required every federal agency to ensure that its actions *in foreign countries*, as well as in the United States, did not jeopardize the continued existence of any endangered species. 50 C.F.R. § 402.02, 43 Fed. Reg. 870, 874 (1978). After these regulations were issued, Congress amended section 1536. The new statutory language is the present version of section 1536 and was basically a reorganization which allowed additions to the rest of the section. The conference report on the 1978 amendments explained the new version of section 7(a) as follows:

> The conferees adopted Senate language creating a new section 7(a) which essentially restates section 7 of existing law, and outlines the responsibilities of the Secretary and other Federal agencies for protecting endangered species. . . . The conferees felt that the Senate provision by retaining existing law was preferable, since regulations governing section 7 are now familiar to most Federal agencies and have received substantial judicial interpretation.

H.R. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978).

This language constitutes the conference committee's "stamp of approval" of existing law and regulations governing section 7. As noted above, the regulations published ten months earlier requiring consultation for agency actions in foreign countries were part of that existing law.

The government argues that the language of the report and the "familiarity" with regulations it refers to relate to the case of *T.V.A. v. Hill*, 437 U.S. 153 (1978), and the activity regarding the snail darter controversay. While the hearings did focus on that topic, one cannot ignore the three-year process of interpreting the scope of the consultation provision and final rules issued in January, 1978. These regulations were part of the "existing law" and "regulations governing section 7" so as to be included in the retention of existing law.

The conference committee's "stamp of approval" of the worldwide scope of section 7, in addition to the all-inclusive language of the statute and the international concerns expressed throughout the ESA, leaves the court with the belief that the intent of Congress is clear. Congress intended that section 1536's consultation requirements were to apply to all actions, including those in foreign countries.

It follows from this finding that the 1986 regulations promulgated by the Secretary of Interior which limited the application of the ESA to those activities occurring within the United States or on the high seas are contrary to the ESA. Summary judgment will be granted in favor of Defenders on that basis.

Accordingly,

IT IS ORDERED That:

1. Defendant's motion for summary judgment is DENIED:

2. Plaintiff's motion for summary judgment is GRANTED; and

3. The Clerk shall enter judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED That the Secretary of Interior shall:

1. Revoke and rescind so much of 50 C.F.R. Part 402 (1987) as limits the consultation requirement of section 7 of the Endangered Species Act, 16 U.S.C. § 1536, to federal agency action that may affect endangered or threatened species in the United States or on the high seas;

2. Publish, within thirty (30) days of the lifting of any stay of execution of this judgment, proposed regulations clearly recognizing the full mandate of section 7 of the Endangered Species Act, expressly and affirmatively requiring that each federal agency consult with the defendant Secretary with respect to any agency action that may affect any endangered or threatened species, wherever found;

3. Publish, within sixty (60) days of the lifting of any stay of execution of this judgment, final regulations clearly recognizing the full mandate of section 7 of the Endangered Species Act, expressly and affirmatively requiring that each federal agency consult with the defendant Secretary with respect to any agency action that may affect any endangered or threatened species, wherever found.

4. Execution of this judgment shall be stayed for sixty (60) days or during the course of any appeal.

DATED: February 15, 1989.

/s/ Donald D. Alsop
DONALD D. ALSOP
Chief U.S. District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 87-5132

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, APPELLANTS

v.

DONALD P. HODEL, as Secretary of the Interior, APPELLEE

Appeal from the United States District Court for the District of Minnesota

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Submitted: December 15, 1987

Filed: July 8, 1988

Before John R. GIBSON, BOWMAN, and WOLLMAN, Circuit Judges.

WOLLMAN, Circuit Judge.

Defenders of Wildlife, Friends of Animals and Their Environment, and the Human Society of the United States (collectively Defenders) brought this action to challenge a Department of Interior final regulation that provides that United States agencies funding projects in foreign countries have no duty to

consult with the Secretary about the projects' impact on endangered species of wildlife or plants. Defenders alleged that the regulation violates the section 7 consultation requirement of the Endangered Species Act, 16 U.S.C. §§ 1531 et seq. (1982). The district court dismissed the action for lack of subject matter jurisdiction, concluding that Defenders failed to satisfy the standing requirement of Article III, Section 2 of the Constitution. We reverse and remand.

I.

In the Endangered Species Act (the Act or ESA), Congress declared that "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction." 16 U.S.C. § 1531(a)(4) (1982). The Secretary must publish in the Federal Register a list of species of wildlife or plants endangered or threatened with extinction. *Id.* § 1533(c)(1). *See also* 50 C.F.R. § 17.11-12 (1986). More than half of the species listed as endangered or threatened are species whose primary ranges are outside of the United States.

Under section 7(a) of the Act, 16 U.S.C. § 1536 (a)(2), a federal agency that authorizes, funds, or carries out any action must consult with the Secretary to insure that the action is "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." *Id.* Federal agencies thus have a mandatory duty to insure that their actions will not harm endangered species. *See* H. Rep. No. 412, 93d Cong., 1st Sess. (1973). The legislative history of the Act "indicates beyond doubt that Congress intended en-

dangered species to be afforded the highest of priorities." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978) (enjoining completion of multimillion-dollar dam to protect snail darter from extinction).

To assist federal agencies in meeting this responsibility, section 7 outlines a process through which agencies are to consult with the Office of Endangered Species of the United States Fish and Wildlife Service or the Office of Protected Species of the National Marine Fisheries Service. The purpose of the consultation process is to supply advice and information identifying actions that may harm listed species or their habitats. The Secretary must issue a written opinion describing the effect of the proposed agency action on endangered species. If the proposed action will harm endangered species, the Secretary must propose acceptable alternative action. *See* 16 U.S.C. § 1536(b). After consultation, "the final decision of whether or not to proceed with the action lies with the agency itself. Section 7 does not give the Department of the Interior a veto over the actions of other federal agencies, provided that the required consultation has occurred." *National Wildlife Fed'n v. Coleman*, 529 F.2d 359, 371 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976); *see also Sierra Club v. Froehlke*, 534 F.2d 1289, 1303 (1976).

The present controversy stems from a final rule, published on June 3, 1986, that limits the scope of consultation. The regulation provides that federal agencies have a duty to consult with the Secretary to insure that any action they authorize, fund, or carry out only "in the United States or upon the high seas" it not likely to jeopardize the continued existence of any listed species. 50 C.F.R. § 402.01 (1986). Previously, consultation on federal agency

actions in foreign countries was required. *See* 50 C.F.R. § 402.04, 43 Fed. Reg. at 874 (1978). Additionally, the new rule defines an "action" as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part by Federal agencies in the United States or upon the high seas." 50 C.F.R. § 402.02 (1986). The Secretary's list of endangered species, however, continues to include species whose primary ranges are outside of the United States.

Defenders brought this action to challenge the new regulation. Count I alleged that the Secretary violated section 7(a) of the Act [1] by not providing listed endangered species the full protection guaranteed them, and that the new regulation "threatens imminently and irreparably" Defenders' interests and the interest of the public in the continued application of section 7 of the Act to agency action abroad. Count II alleged that the Secretary's action in promulgating

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[1] The Act includes a citizen suit provision, 16 U.S.C. § 1540(g), which states in pertinent part:

> (1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—
>
> > (A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; * * * * * * *
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be.

the new regulation was arbitrary, capricious, an abuse of discretion and contrary to law in violation of the Administrative Procedure Act, 5 U.S.C. § 553 and § 701 et seq. Count III alleged that the Secretary violated a statutory duty to conserve endangered and threatened species whose primary ranges are in foreign lands. Defenders asked for a declaratory judgment that the rule was illegal; for injunctive relief enjoining implementation of the new rule; and "that the Court direct defendant to perform the duties owed plaintiffs, specifically to publish forthwith regulations requiring federal agencies to consult on agency actions abroad that may affect endangered or threatened species." First Amended Complaint at 11.

The Secretary moved to dismiss the complaint for lack of subject matter jurisdiction on the ground that Defenders had not alleged the existence of a case or controversy and lacked standing to bring the action. The district court agreed that Defenders had not shown a sufficient injury that was traceable to the Secretary's new regulation and thus dismissed the action for lack of jurisdiction.

II.

Article III of the Constitution limits the power of the federal courts to actual "cases" and "controversies." U.S. Const. art. III, § 2. One purpose of the "cases or controversies" requirement is to ensure that the courts will not intrude into areas committed to other branches of government. *Allen v. Wright*, 468 U.S. 737, 750 (1984). The doctrines that stem from Article III, such as standing, mootness, ripeness, and political question, relate "to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." *Vander Jagt v.*

O'Neill, 699 F.2d 1166, 1178-79 (D.C. Cir. 1982) (Bork, J., concurring), *cert. denied*, 464 U.S. 823 (1983).

Standing is an aspect of justicibility that focuses on the party seeking to bring his complaint before a federal court. "[W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968). To be a proper litigant, the party must have " 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues.' " *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). The Supreme Court summarized the constitutional requirements of standing in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982):

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

Id. at 472.

In addition to the constitutional requirements, courts have imposed prudential or policy limitations on a litigant's standing to bring a claim. For example, a plaintiff cannot assert the rights or interests of third parties. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Also, a court will not decide "abstract questions of wide public significance" most appropriately addressed by the legislature. *Id.* at 500. Furthermore, the plaintiff's complaint must fall within "the zone of interests" to be protected by the statute at issue. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970).

Unlike the constitutional requirements, Congress may eliminate the prudential limitations by legislation. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. at 100. Where "Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff." *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972). In this case, the ESA provides that "any person" may commence a suit to enjoin any person who is alleged to be in violation of the ESA. *See* 16 U.S.C. § 1540(g). Environmental associations are "persons" and may bring suit in their own name. *Id.* at § 1532(13). Defenders therefore need meet only the constitutional requirements for standing for their claims under the ESA.[2]

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[2] Defenders have also alleged a violation of section 702 of the Administrative Procedure Act (APA), 5 U.S.C. § 702 (Supp. II 1982), which provides that persons "adversely affected or aggrieved by agency action within the meaning of a

A. Injury in Fact

We turn first to consider the requirement of injury in fact. A threatened injury may constitute an injury in fact. *Valley Forge*, 454 U.S. at 472. The Supreme Court has recognized allegations of threatened injury on two situations. The first situation "involves cases in which the plaintiff alleges that governmental action will be taken directly against him." *Wilderness Society v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987) (analyzing Supreme Court cases on threatened injury). For example, in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), drug manufacturers sought pre-enforcement review of regulations concerning labels and advertisements for prescription drugs, arguing that the Commissioner had exceeded his statutory authority. *Id.* at 138-39. The Court reasoned that the issue of statutory construction is a purely legal question and that plaintiffs had demonstrated that the clash between the government and the plaintiff was sufficiently immediate and direct. *Id.* at 149-52.

The second situation involves "cases in which the government acts directly against a third party, whose expected response in turn will injure the plaintiff." *Wilderness Society v. Griles*, 824 F.2d at 11. There,

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relevant statute" may bring suit to challenge a final agency action. Under the APA, plaintiffs must show that "the challenged action[] caused them 'injury in fact,' and that the alleged injury was to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agencies were claimed to have violated." *Sierra Club v. Morton*, 405 U.S. at 733. *See also Japan Whaling Ass'n v. American Cetacean Society*, 106 S. Ct. 2860, 2866 n.4 (1986). An interest in preserving endangered species is directly within the zone of interests of the ESA.

the inquiry is whether "the third party's response to the challenged governmental action will injure the plaintiff at all." *Id.* The facts of this case fit into the second situation. The Secretary has issued regulations that provide that agencies funding projects abroad need not consult with the Secretary about the projects' impact on endangered species. The agencies are third parties whose actions in proceeding with projects without considering the projects' effects on endangered species will allegedly injure Defenders.

In their complaint, Defenders stated that:

> Plaintiffs and their members have an interest in the enforcement and administration of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and observe and enjoy, when possible, endangered and threatened species of wildlife, incuding [sic] those species whose primary ranges are outside the United States. The actions of the defendant harm in fact the plaintiffs by, among other ways, increasing the rate of extinction of endangered and threatened species, species whose presence on earth the plaintiffs observe and enjoy.

First Amended Complaint ¶ 5. Defenders submitted affidavits listing pending and ongoing projects in foreign countries that may be harming endangered species.

The district court found that Defenders had asserted merely an interest in the enforcement and administration of the ESA. The Supreme Court "has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen v. Wright*, 468 U.S. at 754. *See*

also, Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. at 482; *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 223 n.13 (1975). Here, however, Defenders also alleged that specific projects in foreign countries which their members had visited were increasing the rate of extinction of endangered species. An interest in aesthetic, conservational, and recreational values will support standing when an organizational plaintiff alleges that its members use the area and will be adversely affected. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 702 (1973); *Sierra Club v. Morton*, 405 U.S. at 734-35.

Defenders also argue that the Secretary's refusal to carry out a statutorily mandated procedure constitutes sufficient injury in fact to confer standing. Defenders rely on *Watt v. Energy Action Educational Found.*, 454 U.S. 151 (1981), where the plaintiffs alleged that the Secretary of the Interior had breached a statutory obligation to experiment with various bidding systems for leasing tracts of the outer continental shelf. The plaintiffs had standing to challenge the Secretary's refusal to experiment with various bidding systems because the relief requested—an injunction prohibiting further lease sales until the Secretary issued regulations for alternative bidding systems—would result in the Secretary using the best bidding system. *Id.* at 162. In the present case, however, the Secretary correctly points out that in *Watt* the plaintiffs had alleged an economic, not a procedural, injury.

Various courts of appeals have held that agency violations of procedural rights constitute injury in fact. In *Trustees for Alaska v. Hodel*, 806 F.2d 1378

(9th Cir. 1986), five environmental groups filed an action for declaratory and injunctive relief against the Department of the Interior to require the Department to follow all necessary public participation procedures in preparing an environmental impact statement under the National Environmental Policy Act of 1969 (NEPA) before submitting a report to Congress with recommendations concerning possible exploration of oil and gas within the coastal plain. *Id.* at 1379-80. The Department contended that mere speculation on the contents of the report did not confer standing. The Ninth Circuit disagreed, holding that the environmental groups had standing to challenge alleged agency violations of procedural rights. *Id.* at 1380. *See also Oregon Environmental Council v. Kunzman*, 817 F.2d 484, 491 (9th Cir. 1987) (procedural defects in environmental impact statement (EIS) preparation create risk that environmental impacts will be overlooked and constitute injury in fact); *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 428 (1st Cir. 1983) (failure to make allegedly mandatory study is procedural error).

The Secretary does not contest that a proecdural injury may be a judicially cognizable injury in fact. Instead, he responds that Defenders did not allege a procedural injury in their complaint. We disagree. Defenders alleged that they and their members have an interest in the enforcement and administration of the ESA. First Amended Complaint ¶ 5. In their prayer for relief, Defenders requested that "the Court direct defendant to perform the duties owed plaintiffs, specifically to publish forthwith regulations requiring federal agencies to consult on agency actions abroad that may affect endangered or threatened species." *Id.* at 11. We conclude that Defend-

ers have pleaded a procedural harm as well as harm in the increased rate of extinction of endangered species.

B. Fairly Traceable and Likely to be Redressed

The Secretary concedes that physical damage to a place an individual personally visits or to animals he actually observes is a type of injury sufficient to confer standing under Article III. The parties disagree over whether this injury to the Defenders' professional and aesthetic interests in the existence of endangered species is traceable to the Secretary's action in promulgating the new regulation and whether the injunctive relief sought will redress the complained-of injury.

The district court raised questions concerning the projects that the Defenders listed as increasing the rate of extinction of endangered species. Several of the projects were funded by the World Bank, which is not a federal agency. Other projects had been halted or completed. None of the projects was initiated subsequent to the publication of the new rule. The district court therefore concluded that no harm could have yet resulted from the new rule.

On appeal, Defenders argue that harm has resulted from the new rule because no consultation was ever done on the ongoing Mahaweli project in Sri Lanka, funded by the Agency for International Development (AID). Eight endangered species—the Indian elephant, leopard, purple-faced langur, toque macaque, red-face malkoha, Bengal monitor, mugger crocodile, and python—are found in the project area. Although there is a continuing need for consultation, under the new rule AID will never be compelled to consult with the Secretary about the project's effect on en-

dangered species. A member of Defenders who has visited the area of the Mahaweli project for the purpose of observing its wildlife will be injured.

The district court also reasoned that consultation might have already occurred. In ruling on a motion to dismiss for want of standing, however, the court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. at 501. Defenders' affidavits attached to the complaint alleged that for the ongoing Mahaweli project, no section 7 consultation has ever been conducted. Accordingly, it was inappropriate for the district court to surmise that consultation might already have occurred.

Additionally, reinitiation of formal consultation is required when "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." *Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (9th Cir. 1987) (emphasis deleted) (quoting 50 C.F.R. § 402.16(b)). Defenders cited AID's Picchis-Palcazu community forestry project in Peru as threatening harm to endangered species, including the jaguar, uakari, and Geoldi's marmoset. Also, the Bureau of Reclamation has a nine-year commitment (1982-1991) to aid in the rehabilitation of the Aswan High Dam on the Nile in Egypt. This project threatens the endangered Nile crocodile. Thus, even in the ongoing projects in which consultation has occurred, changed circumstances could require additional consultation. We therefore conclude that the district court should not have rejected as irrelevant the projects that Defenders identified on the ground that none was initiated subsequent to the promulation of the new rule.

The district court found that the threatened harm from current and pending projects failed to meet the causation requirement for two additional reasons: (1) there was no indication that the projects would affect endangered or threatened species; and (2) the Defenders had not sought to enjoin the action agency.

Defenders argue that a litigant's standing to challenge the new regulation does not depend on proof that the projects will harm endangered or threatened species. Implicit in Defenders' allegation of procedural injury is the creation of a risk that harm to endangered species may be overlooked by an agency's failure to consult. Defenders correctly point out that the district court's reasoning would require the environmental groups to conduct their own independent investigation before commencing an action. The Ninth Circuit rejected a similar requirement under the NEPA:

> Were we to agree with the district court that a NEPA plaintiff's standing depends on "proof" that the challenged federal project will have particular environmental effects, we would in essence be requiring that the plaintiff conduct the same environmental investigation that he seeks in his suit to compel the agency to undertake. Compliance with NEPA is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs. It is the federal agency, not environmental action groups or local government, which is required by NEPA to produce an EIS.

City of Davis v. Coleman, 521 F.2d 661, 670-71 (9th Cir. 1975) (footnote omitted).

In arguing that Defenders have not proved the necessary causation, the Secretary relies on *Allen v. Wright*, 468 U.S. 737 (1984). There, the Supreme Court held that parents of black children attending public schools lacked standing to challenge the sufficiency of Internal Revenue Service regulations that would deny tax-exempt status to racially discriminatory private schools. The chain of causation between the regulations and the plaintiffs' diminished ability to have their children educated in a racially integrated public school was found to be too speculative and indirect to support standing and depended on the independent actions of various third parties not before the court. The plaintiffs had not shown that "there were enough racially discriminatory private schools receiving tax exemptions" in the community to make a difference. *Id.* at 758. Also, it was entirely speculative "whether withdrawal of a tax exemption from any particular school would lead the school to change its policies" or "whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result" of any change in policy. *Id.*

The Secretary argues that to establish traceability in this case, Defenders must show that the new regulation caused the action agencies not to consult with the Secretary and that the failure to consult led to programs being designed in a way that would harm endangered species. He argues that it is mere speculation that consultation would have made any difference, noting that in two of the projects, AID conducted its own environmental assessment. Additionally, the final design of the project depends on the independent actions of the host countries, who are third parties not before the court.

Furthermore, the Secretary argues that to prove redressability, Defenders must show that an injunction requiring the Secretary to issue a regulation requiring consultation on foreign projects would actually result in consultation, which in turn would result in a change in the project. The Secretary argues that an injunction against the new rule would not directly force the agencies to consult because the agencies' obligations stem from the ESA itself, not the regulation.

Defenders respond that the Secretary's reliance on *Wright*, a taxpayer case, is unfounded. They contend that this case is more akin to *United States v. SCRAP*, 412 U.S. 669 (1973), and other environmental cases. In *SCRAP*, an environmental association challenged the Interstate Commerce Commission's failure to suspend a surcharge on railroad freight rates as violative of the Commission's statutory duty, on the ground that it had failed to file a detailed environmental impact statement. *United States v. SCRAP*, 412 U.S. at 679. The Court acknowledged that, in contrast to the situation in *Sierra Club v. Morton*, it was being asked to follow a "more attenuated line of causation" from the increased rates to their economic, recreational and aesthetic harm. *Id.* at 688.

> [A] general rate increase would allegedly cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area.

Id. Notwithstanding this rather tenuously linked chain of causation, the Court held that the plaintiffs had standing. *Id.*

We agree with Defenders that the facts of this case are more like *SCRAP* than *Allen v. Wright.* Significantly, *Allen v. Wright* involved a constitutional challenge, whereas this case involves, as did *SCRAP*, questions of statutory interpretation. Commentators have noted that if a "plaintiff is protesting a claimed invasion of a generalized constitutional injury, the Court appears to be more reluctant to find standing * * * than in cases where the plaintiff is arguably within the zone of interests protected by a federal statute, or a statute appears to grant standing in the case." 1 R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law* 129-30 (1986). Unlike *Allen v. Wright*, Congress has in this case granted standing to "any person" to enforce the ESA.

One rationale used to support a finding of causation in cases challenging agency regulations is that Congress itself has legislated the requisite causation and redressability. *See Center for Auto Safety v. NHTSA*, 793 F.2d 1322, 1334-35 (D.C. Cir. 1986); *see generally*, Wald, *The D.C. Circuit: Here and Now*, 55 Geo. Wash. L. Rev. 718, 723 (1987) (discussing separation of powers issues relating to standing). In *Center for Auto Safety*, consumer associations challenged the agency's failure to promulgate stringent fuel efficiency regulations, as required by the Energy Policy and Conservation Act of 1975. The organization alleged that its members were injured by being deprived of the opportunity to purchase fuel efficient cars. The agency countered that the regulation would have no practical effect on the types of vehicles available. The court found standing on the ground that

Congress had determined that the automobile industry would comply with more stringent fuel efficiency standards instead of paying fines. "If setting a higher standard cannot result in vehicles with increased fuel efficiency, then the entire regulatory scheme is pointless." *Id.*

We agree with Defenders' contention that Congress has determined that the remedy for the harm to their members' personal, professional, and aesthetic interest in endangered species is consultation between the Secretary and the action agency. Thus, the same considerations that supported the finding of standing in *Center for Auto Safety* are present here.

Finally, we disagree with the district court's reasoning that the Defenders should have enjoined the agency action rather than the new regulation. We see no reason to require Defenders to seek to enjoin the construction of a project. We are satisfied that an injunction requiring the Secretary to publish regulations mandating that federal agencies consult on agency actions abroad would result in consultation, which in turn would foreclose the possibility that serious harm to endangered species will be overlooked.

The order dismissing the complaint is reversed and the case is remanded to the district court for further proceedings consistent with this opinion.

BOWMAN, Circuit Judge, dissenting.

I respectfully dissent from the Court's slightly surrealistic holding that the plaintiffs have standing to maintain this lawsuit. The constitutional requirements for standing compel, it seems to me, the opposite result. The Supreme Court of the United States has stated that, at an irreducible minimum, Article III requires plaintiffs to allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). This irreducible minimum is a "core component derived directly from the Constitution." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Plaintiffs therefore must show that their alleged injury (increased likelihood of diminished opportunities to enjoy viewing endangered species in foreign lands) is traceable to the defendant's allegedly unlawful conduct and that the relief requested will redress the injury. I part company with the majority at this point in the analysis because I do not believe that plaintiffs have made this showing.

As to the traceability requirement, I believe that the purported causal link between the challenged regulation and any harm to endangered species in foreign lands is far too speculative, attenuated, and remote to support standing. The Endangered Species Act (ESA) does not give the Secretary the power to order an action agency to comply with his requests or to veto its decision. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987). Nor does the Secretary have any power to direct the actions or decisions of a foreign country. Even if the action agency

independently decided to forego participation in a foreign project, it is entirely speculative whether the host nation would abandon its plans to seek the withdrawn aid, be it funding or technical assistance, from another source. "[U]nadorned speculation will not suffice to invoke the federal judicial power." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976).

It is no answer in this case to say that the Secretary's alleged failure to comply with the statute (by not requiring the action agencies to consult with him on foreign projects) creates the risk that harm to endangered species may be overlooked by an agency's failure to consult. *See* ante at 12. The ESA itself, independent of the regulations promulgated thereunder, imposes an obligation on the agencies that assist overseas projects to insure that their actions are not likely to jeopardize the continued existence of any threatened species. *See* 16 U.S.C. § 1536(a)(1)-(2). The consultation process, or the lack thereof, in no way diminishes this duty.[1]

As to the redressability requirement, I cannot discern how the relief that plaintiffs seek would effectively address their alleged injury. As previously mentioned, even if the Secretary is ordered to require the action agencies to consult with him regarding foreign ventures, the action agency and the host nation still would be legally entitled to exercise their independent judgment concerning proposed projects.

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[1] The record demonstrates that the action agencies take this duty very seriously. The claim that formal consultation with the Secretary would have any impact on the concern of these agencies for the protection of endangered species or their actual decisions on particular projects is at best conjectural.

Further, regardless of the availability of consultation, the action agency has a duty under the ESA to insure the environmental soundness of its operations.

The Court's response to these concerns is the assertion that "Congress itself has legislated the requisite causation and redressability." *Ante* at 15. Even accepting as correct, as the Court does, *ante* at 16, plaintiffs' "contention that Congress has determined that the remedy for the harm to their members' personal, professional, and aesthetic interest in endangered species is consultation between the Secretary and the action agency," it does not follow that plaintiffs have satisfied the constitutional requirements for standing. For it is the courts, not Congress, which must decide whether Article III, Section 2 of the Constitution has been satisfied in the circumstances of the particular case. We cannot satisfy this duty by deciding that Congress may have intended for us to exercise jurisdiction—an intention, by the way, that is far from clear; we must decide that the Constitution authorizes us to do so.

Read literally, the citizen suit provision of ESA, 16 U.S.C. § 1540(g), authorizes "any person" to bring suit to enjoin "violation of any provision [of ESA] or regulation issued under the authority thereof." This provision does not advert in any way to any of the constitutional requirements for standing. To construe section 1540(g) as the Court does is to attribute to Congress the unexpressed intent to dispense with standing requirements entirely, and to allow "any person" to sue for an injunction against "violation of any provision" of ESA or its regulations. Surely Congress did not intend this provision to be read in a vacuum, without regard to constitutional limitations.

For the reasons adumbrated above, I would affirm the decision of the District Court dismissing this action for lack of standing.

A true Copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-86 CIV 757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, and THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS

v.

DONALD P. HODEL, as Secretary of the Interior, DEFENDANT

MEMORANDUM ORDER

[Filed Feb. 25, 1987]

This matter comes before the court on defendant Secretary of the Interior's motion to dismiss. In support of his motion, the Secretary argues that the

court lacks jurisdiction because the issues raised by the plaintiffs are not justiciable. Specifically, the Secretary alleges that the plaintiffs' have not alleged the existence of a case or controversy and lack standing to bring this action.

BACKGROUND

The underlying dispute presented by this case concerns the validity of the Secretary's action in rescinding a rule that required federal agencies to consult with the defendant when agency action abroad might affect species of wildlife or plants listed by the Secretary as endangered or threatened. In 1973, Congress enacted the Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq., to facilitate conservation of endangered and threatened species. Section of the Act, 16 U.S.C. § 1533, requires the Secretary to list the species of wildlife and plants endangered or threatened with extinction. The list established by the Secretary contains both domestic and international wildlife and plants. *See* 50 C.F.R. § 17.11 (Oct. 1985). Section 7(a)(2) of the Act, 16 U.S.C. § 1536(a)(2), imposes a duty on federal agencies to consult with the Secretary to insure that action authorized, funded, or carried out by federal agencies is "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . ."

Initially the Secretary interpreted Section 7 as requiring consultation when federal agencies authorized, funded, or carried out projects in foreign countries.[1] 50 C.F.R. § 402.04 (Oct. 1984). On

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[1] The Secretary also requires Section 7 consultation when federal agencies authorize, fund, or carry out projects within the United States and on the high seas.

June 3, 1986, the Secretary published a final rule that modified the scope of Section 7. The new rule rescinded the requirement for Section 7 consultation when agency action occurred in foreign countries. 51 Fed. Reg. 19930 (1986).

The plaintiffs argue that the reinterpretation of Section 7 through the 1986 rulemaking is invalid on its face as contrary to the provisions of the ESA. The plaintiffs were unable to refer to any specific agency action in a foreign country initiated subsequent to the publication of the rule modifying the Secretary's interpretation of Section 7. Instead, the plaintiff directs the court's attention to several ongoing projects in foreign countries, all of which were initiated prior to the June 3, 1986, publication date.

DISCUSSION

The issue raised by the defendant's motion concerns whether the plaintiffs' claims satisfy the "case and controversy" requirement of Article III Section 2 of the Constitution.[2] Article III limits the "judicial

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[2] The defendant also raises prudential or policy limitations to asserting jurisdiction over the plaintiffs claims. Specifically, defendant argues that the court should decline to assert jurisdiction over the plaintiffs' claims because the plaintiffs' injuries do not fall within the zone of interest protected by the ESA, the plaintiffs are asserting generalized grievances, and plaintiffs are raising a third-person's legal rights. *See generally Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982). Because Congress has expressly augmented standing in the ESA, 16 U.S.C. § 1504(g), *see National Wildlife Federation v. Coleman*, 400 F. Supp, 705, 710 (D. Mass. 1975), *rev'd on other grounds*, 529 F.2d 359 (5th Cir. 1976), *cert. denied*, 429 U.S. 979, the court lacks authority to create prudential barriers to standing in lawsuits

power" of federal courts to the resolution of "cases" and "controversies". *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). "The power to declare the rights of individuals and to measure the authority of governments . . . 'is legitimate only in the last resort, and as a necessity in the determination of a real, earnest, and vital controversy.'" *Id.* (quoting *Chicago & Grand Trunk Co. v. Wellman*, 143 U.S. 339, 345 (1892)).

The aspect of the case and controversy requirement that is brought into focus by the instant motion is standing. The Supreme Court has recently clarified the "irreducible minimum" a plaintiff must show in order to satisfy the standing requirement of Article III in *Valley Forge*. A plaintiff must "show that he personally has suffered some actual or threatened injury as a result of the punitively [*sic*] illegal conduct of the defendant, and that the injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision."[3] 454 U.S. at 472 (citations omitted). Relevant inquiries when determining standing in a particular case include:

> Is the injury too abstract or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal con-

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brought to enjoin violations of the Act. *See, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). Congress may not, however, abrogate the constitutional aspect of the standing requirement. *Gladstone Realtors*, 441 U.S. at 100.

[3] In addition to the constitutional component, the standing doctrine embraces prudential considerations which were discussed in footnote 1.

> duct and injury too attenuated? Is the prospect for obtaining relief from the injury as a result of a favorable ruling too speculative?

Allen v. Wright, 468 U.S. 737, 752 (1984).

Relying on much of the above-cited authority, the Secretary argues that the plaintiff has failed to show an actual or threatened injury as the result of the Secretary's reinterpretation of Section 7. The plaintiffs proffer two arguably separate and distinct sets of injuries,[4] neither of which, for reasons discussed below, is sufficient to satisfy the standing requirement of Article III.

The first of the plaintiffs' injuries is the only injury expressly stated in the plaintiffs' complaint. For purposes of ruling on this motion to dismiss, the court must accept as true all material allegations in the complaint, and must construe the complaint in favor of the complaining party. *Warth v. Seldin*, 422 U.S. 490, 501 (1974). In their complaint, plaintiffs state that members of their organization benefit both professionally and personally from observing endangered and threatened species of wildlife and plants whose primary range are outside the United States. Therefore, they argue, they have an interest in the

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[4] In addition to their alleged injuries, plaintiffs offer several practical reasons why the court should hear this case. First, plaintiffs emphasize that the issue raised by their complaint is one of law, and is appropriate for judicial resolution. Second, because the scope of the lawsuit is purely legal, a factual record or factual setting is unnecessary. Finally, the plaintiffs have a strong and intense interest in protecting endangered species. Even these practical considerations, standing alone or when combined, cannot overcome the requirements of Article III.

enforcement and administration of the ESA. (Amended Complaint ¶ 2).

Although there is no precise definition of injury in fact, comparing the allegations in this complaint to those made in prior standing cases clearly demonstrates the insufficiency of the above-mentioned "injury". *See, e.g., Allen v. Wright*, 468 U.S. 737, 754 (1984) (Court has repeatedly held that an asserted right to have Government act in accordance with law is not sufficient to satisfy standing requirement); *Valley Forge*, 454 U.S. at 483-84 (plaintiffs lacked standing to require that Government be administered according to law); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (mere interest in the problem of environmental protection is insufficient to confer standing). Ignoring the above-cited authority, plaintiffs have merely alleged an interest in the proper enforcement of the ESA to insure that endangered species are fully protected. The amended complaint fails to allege any specific agency action in foreign countries that have adversely affected endangered species as the result of the Secretary's reinterpretation of Section 7. Accordingly, the court concludes that the plaintiffs interest in proper enforcement of the ESA, however admirable, is not a sufficient injury for purposes of Article III standing.

Apparently realizing the standing deficiencies in their complaint, plaintiffs have attempted to establish a record of additional injuries or set of injuries.[5] In the memorandum in opposition to defendants motion, plaintiffs list eight projects which they allege are ongoing projects in foreign countries that are

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[5] It is within the court's authority to allow the plaintiffs to supply, by amendment to the complaint or by affidavit, further particularized allegations deemed supportive of plaintiffs' standing. *Warth*, 422 U.S. at 501.

harming endangered species. Of these eight, only three are ongoing projects that are actually being funded or carried out by federal agencies.[6] A fourth project, the Lower Mekong Project, is being planned by the Bureau of Reclamation. In addition to the above-mentioned projects, the plaintiffs direct the court's attention to a Bureau of Reclamation document detailing various projects in foreign countries that the Bureau is involved in. The Bureau's involvement in most of these projects is limited to studying, planning, or technical advice.

The plaintiffs note that under the new regulation the federal agencies involved in the above-cited ongoing and planned projects no longer have a continuing duty to consult with the Secretary. Consequently, the plaintiffs argue that these projects provide a sufficient actual or threatened injury to satisfy the standing requirement of Article III, Section 2.[7]

Plaintiffs rely on *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1979), in support of their argument that federal agencies have a continuing duty to consult with the Secretary during the pendency of foreign projects. In *Tennessee Valley Authority*, plaintiffs sought to enjoin the completion of the Tel-

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[6] The Nam Choan Dam and the Temenggor Dam projects were funded by the World Bank, which is not a federal agency. The Tembeling River Dam Project has been halted. The Itaipu Dam was completed in 1983.

[7] The plaintiffs do not clearly articulate how the failure to consult with the Secretary during the pendency of these projects injures them. Presumably, the absence of consultation during the pendency of these projects raises a potential for harm to endangered species because the agencies are unaware of or insensitive to the environmental effects of their actions.

lico Dam claiming that such action would violate the ESA by causing the snail darters[']extinction. The consultation aspect of Section 7 was not the focus of the litigation. The Tennessee Valley Authority (TVA) consulted with the Secretary, and the Secretary clearly stated that completion of the dam would result in total destruction of the snail darters[']critical habitat. *Id.* at 161-62. It was TVA's position, however, that the ESA did not apply to the dam because the project was initiated before the ESA became effective and Congress continued to appropriate funds to the dam following the effective date of the ESA despite their knowledge that the dam would affect the snail darters[']existence. The Court enjoined the completion of the dam holding that TVA's Section 7 duty to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of endangered species or result in the destruction or modification of habitat of such species applied to the Tellico Dam.

Contrary to the plaintiffs' assertion otherwise, *Tennessee Valley Authority* stands for the proposition that federal agencies have a continuing duty during the pendency of a project to insure that the project does not jeopardize endangered species. The parties did not raise and the court did not address the issue of continuing consultation.

For reason [*sic*] discussed below, neither the ongoing projects or the projects detailed in the Bureau of Reclamation document, provide a sufficient basis for showing an actual or threatened injury traceable to the Secretary's reinterpretation of Section 7. First, there is no indication that the projects summarized in the Bureau of Reclamation document will affect endangered or threatened species of wildlife or plants,

or, as to most of the projects, when they would begin. Second, it is entirely possible that Section 7 consultation has occurred at the initial or latter stages of both the ongoing and planned projects.[8] After consulting with the Secretary, the final decision of whether to proceed or continue with a project lies with the acting agency. *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976); *Sierra Club v. Forehlke*, 534 F.2d 1289 (8th Cir. 1976). Consequently, additional consultation, absent changed circumstances, would be meaningless.

Third, even assuming for purposes of this motion that, in addition to the initial Section 7 consultation, federal agencies have a duty to consult with the Secretary during the pendency of agency action in a foreign country, plaintiffs have not sought to enjoin the agency action that they contend is allegedly causing them harm. (The Mahaweli Project is allegedly harming leopards and elephants; the Picchis-Palcazu Project is allegedly harming jaguars and marmusets; the Aswan Dam Project is allegedly harming the Nile crocodile.) Instead, the plaintiffs would have the court construe the ESA in the abstract. The court believes, however, that limited judicial resources counsel against deciding cases when the plaintiff has failed to request a remedy that will redress the injury the plaintiff is relying on to show standing. If after accepting jurisdiction and determining that the

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[8] This possibility is enhanced by the information that the Agency for International Development funded the preparation of environmental assessments for both the Mahaweli River Basin Project and the Picchis-Palchazu Forestry Project which lead [*sic*] to alternative or additional action to minimize or eliminate the effect on endangered species. (Cohen affidavit at 2-3).

Secretary's reinterpretation of Section 7 was invalid the Secretary and the relevant federal agencies did not voluntarily initiate consultation regarding the Mahaweli, Picchis-Palcazu, and Aswan Dam projects, the plaintiffs would have to bring a second lawsuit to enjoin the agency action as it relates to those particular projects. The plaintiff is not required, of course, to correct all alleged violations of the ESA in one lawsuit. But requesting a remedy that alleviates at least some of the plaintiffs' alleged harm is a more efficient use of judicial resource and is part of the purpose underlying the standing requirement. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 79 (1978) (standing requires that plaintiffs alleged injuries that are likely to be redressed by the requested relief). Accordingly, the court concludes that the plaintiffs have failed to satisfy the standing requirement of Article III, Section 2.

Based upon the record as presently constituted,

IT IS ORDERED That defendant's motion to dismiss its granted and that plaintiffs' action shall be dismissed for lack of standing.

DATED: February 25, 1987.

/s/ Donald D. Alsop
DONALD D. ALSOP
Chief U.S. District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-5192/5386MN

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT; AND THE HUMANE SOCIETY OF THE UNITED STATES, APPELLEES

vs.

MANUEL LUJAN, as Secretary of the Interior, APPELLANT

ORDER DENYING PETITION
FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judges Bowman and Beam would have granted the petition.

Petition for rehearing by the panel is also denied.

December 10, 1990

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX F

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 2 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531, provides:

Congressional findings and declaration of purposes and policy

(a) Findings

The Congress finds and declares that—

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to—

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy

(1) It is further declared to be the policy of Congress that all Federal departments and agen-

cies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

2. Section 4 of the ESA, 16 U.S.C. 1533, provides in relevant part:

Determination of endangered species and threatened species

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

* * * * *

(b) Basis for determinations

(1)(A) The Secretary shall make determinations required by subsection (a)(1) of this section solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

(B) In carrying out this section, the Secretary shall give consideration to species which have been—

(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

* * * * *

(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3) of this section, the Secretary shall—

(A) not less than 90 days before the effective date of the regulation—

(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and

(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;

(B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;

* * * * *

3. Section 7 of the ESA, 16 U.S.C. 1536, provides in relevant part:

Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered

species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

* * * * *

(e) Endangered Species Committee

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) of this section shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

* * * * *

(g) Application for exemption; report to Committee

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2) of this section, the Secretary's opinion under subsection (b) of this section indicates that the agency action would violate subsection (a)(2) of this section. An application for an exemption shall be considered initially by the Secretary in the manner provided for in this

subsection, and shall be considered by the Committee for a final determination under subsection (h) of this section after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

* * * * *

(2)(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

* * * * *

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5) of this section. The Committee shall grant an exemption from the requirements of subsection (a)(2) of this section for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of

the hearing held under subsection (g)(4) of this section and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of Title 5.

* * * * *

(j) Exemption for national security reasons

Notwithstanding any other provision of this chapter, the Committee shall grant an exemption

for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

* * * * *

4. Section 8 of the ESA, 16 U.S.C. 1537, provides:

International cooperation

(a) Financial assistance

As a demonstration of the commitment of the United States to the worldwide protection of endangered species and threatened species, the President may, subject to the provisions of section 1306 of Title 31, use foreign currencies accruing to the United States Government under the Agricultural Trade Development and Assistance Act of 1954 [7 U.S.C.A. § 1691 et seq.] or any other law to provide to any foreign country (with its consent) assistance in the development and management of programs in that country which the Secretary determines to be necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to section 1533 of this title. The President shall provide assistance (which includes, but is not limited to, the acquisition, by lease or otherwise, of lands, waters, or interests therein) to foreign countries under this section under such terms and conditions as he deems appropriate. Whenever foreign currencies are available for the provision of assistance under this section, such currencies shall be used in preference to funds appropriated under the authority of section 1542 of this title.

(b) Encouragement of foreign programs

In order to carry out further the provisions of this chapter, the Secretary, through the Secretary of State, shall encourage—

(1) foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to section 1533 of this title;

(2) the entering into of bilateral or multilateral agreements with foreign countries to provide for such conservation; and

(3) foreign persons who directly or indirectly take fish or wildlife or plants in foreign countries or on the high seas for importation into the United States for commercial or other purposes to develop and carry out with such assistance as he may provide, conservation practices designed to enhance such fish or wildlife or plants and their habitat.

(c) Personnel

After consultation with the Secretary of State, the Secretary may—

(1) assign or otherwise make available any officer or employee of his department for the purpose of cooperating with foreign countries and international organizations in developing personnel resources and programs which promote the conservation of fish or wildlife or plants; and

(2) conduct or provide financial assistance for the educational training of foreign personnel, in this country or abroad, in fish, wildlife, or plant management, research and law enforcement and to render professional assistance abroad in such matters.

(d) Investigations

After consultation with the Secretary of State and the Secretary of the Treasury, as appropriate, the Secretary may conduct or cause to be conducted such law enforcement investigations and research abroad as he deems necessary to carry out the purposes of this chapter.

5. Section 9 of the ESA, 16 U.S.C. 1538, provides in relevant part:

Prohibited acts

(a) Generally

(1) Except as provided in sections 1535(g) (2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

* * * * *

6. Section 11 of the ESA, 16 U.S.C. 1540, provides in relevant part:

* * * * *

(g) **Citizen suits**

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

* * * * *

7. 50 C.F.R. 402.01 provides in relevant part:

Scope.

(a) This part interprets and implements sections 7(a)-(d) [16 U.S.C. 1536(a)-(d)] of the Endangered Species Act of 1973, as amended ("Act").

* * * * *

Section 7(a)(2) of the Act requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action it authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species or results in the destruction or adverse modification of critical habitat.

8. 50 C.F.R. 402.02 provides in relevant part:

Definitions.

* * * * *

"*Action*" means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.

* * * * *

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No. 90-1424

In The

Supreme Court of the United States

October Term, 1990

MANUEL LUJAN, JR., SECRETARY
OF THE INTERIOR,

Petitioner,

v.

DEFENDERS OF WILDLIFE, FRIENDS OF
ANIMALS AND THEIR ENVIRONMENT, AND
THE HUMANE SOCIETY OF THE UNITED STATES,

Respondents.

**Petition For Writ Of Certiorari
To The United States Court Of
Appeals For The Eighth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the findings of fact of the district court, independently reviewed by the United States Court of Appeals for the Eighth Circuit, that respondents have proven their standing to bring this action were clearly erroneous.

2. Whether the United States Court of Appeals for the Eighth Circuit correctly held that the Secretary's 1986 regulation barring interagency consultation on U.S. agency actions that may affect endangered or threatened species abroad violates the plain language of the Endangered Species Act.

PARTIES

The petitioner is the Secretary of the Interior, Manuel Lujan, Jr.

The respondents are Defenders of Wildlife, Friends of Animals and Their Environment, and The Humane Society of the United States.

The respondents have no parent corporations or subsidiaries within the meaning of Supreme Court Rule 29.1.

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No. 90-1424

In The

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MANUEL LUJAN, JR., SECRETARY
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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Defenders of Wildlife, Friends of Animals and Their Environment, and The Humane Society of the United States (collectively "Defenders") submit this brief in opposition to Petitioner Secretary of the Interior ("Secretary") Lujan's request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

This case presents two issues. The first is a straightforward application of this Court's standing precedent to a well-developed factual record. The issue on the merits is whether the Secretary's 1986 regulation which, in a sharp reversal of prior regulations, makes endangered species consultations unavailable to U.S. agencies when those agencies take action which may affect listed species abroad, violates the Endangered Species Act. That act requires the Secretary to engage in consultation with *each* federal agency on *any* action which may affect *any* species, wherever found.

This case presents no issues with regard to foreign affairs. There is nothing in the record below which indicates that the Endangered Species Act consultation process, in conjunction with the many other study processes federal agencies undertake, places any unacceptable burdens on U.S. agency planning. Indeed, the endangered species consultation process has worked successfully domestically for 18 years.

This Court has long given the broad language of the Endangered Species Act its full play. In *TVA v. Hill*, 437 U.S. 153, 184 (1978), this Court identified the congressional purpose in passing the Act:

> The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. *This is reflected not only in the stated policies of the Act, but in literally every section of the statute.*

(Emphasis added.)

This case, like *TVA v. Hill*, involves the commands of Section 7 of the statute, 16 U.S.C. § 1536. There is nothing mysterious or unclear about the scope and impact of that section. As this Court recognized in *TVA v. Hill*:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to *insure* that actions *authorized, funded,* or *carried out* by them do not *jeopardize* the continued existence" of an endangered species or "*result* in the destruction or modification of habitat of such species. . . . " 16 U.S.C. § 1536. This language admits of no exception.

437 U.S. at 173.

There is nothing extraordinary in the judgment of the court of appeals of which the Secretary seeks review. While the Secretary in his petition denigrates the holding of the Eighth Circuit, that court fully and fairly considered every point now raised by the Secretary. Both in its procedural aspects (standing) and in its substance, the decision of the Eighth Circuit is fully consistent with the decisions of this Court. Further review should be denied.

1. The Act Itself

> "[T]he Act, viewed as a whole, clearly demonstrates congressional commitment to worldwide conservation efforts."
>
> *Defenders of Wildlife v. Lujan*, 911 F.2d at 123.

Section 2 – The opening section of the Act evinces Congress' intent to protect endangered species worldwide. The Act states that the United States has pledged

itself in at least six international treaties to conserve endangered species, and it identifies one of the primary purposes of the Act to be the means to achieve the goals of those treaties and conventions. 16 U.S.C. § 1531(a)(4) and (b). The Act commands all federal agencies to use their authorities in furtherance of its purposes, including the international purposes just recited. 16 U.S.C. §§ 1531(c) and 1536(a)(1).

Section 4 – Under Section 4 of the Act, 16 U.S.C. § 1533,

> The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species . . . .

16 U.S.C. § 1533(a)(1). Under Section 4(b):

> (1)(A) The Secretary [of the Interior] shall make determinations . . . solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or *foreign nation*, . . . to protect such species . . . .
>
> (B) In carrying out this section, the Secretary shall give consideration to species which have been –
>
> > (i) designated as requiring protection from unrestricted commerce by any *foreign nation*, or pursuant to any *international agreement*; or
> >
> > (ii) identified as in danger of extinction . . . by any State agency or by any agency of a *foreign nation* that is responsible for . . . conservation . . . .

16 U.S.C. §1533(b) (emphasis added). The Secretary's regulations with regard to listing, and the lists of endangered species themselves, may be found at 50 C.F.R. Part 17.

Under Section 4 and the Secretary's published regulations, both domestic species and species whose range is foreign to the United States are listed if endangered or threatened. The Secretary does not contest that as of May 1989, of 1,046 species listed by him as endangered or threatened, 507 were species whose entire range is outside the United States. In addition, there are 71 listed species whose range includes both United States and foreign territory. 911 F.2d at 123. The Secretary has never in this litigation disputed that the Act requires him to list both domestic and foreign endangered species.

Section 7 – Section 7 of the Endangered Species Act is the section that primarily affects federal agencies as they carry out their various statutory mandates. Under Section 7(a)(2), 16 U.S.C. § 1536(a)(2),

> *Each* Federal agency shall, in consultation with and with the assistance of the Secretary, insure that *any* action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of *any* endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species . . . .

(Emphasis added.) After consultation with an affected agency, the Secretary must issue an opinion on the effect of the proposed federal agency action on listed species, and propose an acceptable alternative action if the intended action is found to jeopardize listed species. 16

U.S.C. § 1536(b)(3).[1] As the Eighth Circuit held, Section 7 applies to *each* federal agency undertaking *any* action that may affect *any* listed species. 911 F.2d at 122.

Congress has on numerous occasions indicated its belief that the Section 7 consultation process is the best way for federal agencies to meet the goals of the Endangered Species Act. In the legislative history to the 1979 amendments to the Act, Congress stated, "This consultation process is central to the resolution of conflicts under the act." H.R. Rep. No. 167, 96th Cong., 1st Sess. 5 (1979).

Congress has never during the eighteen year existence of the Act attempted to narrow the scope of consultation or diminish its impact or importance. Congress has steadfastly pointed to "a strong record of timeliness" and "adequacy," and has found that consultation has resulted in the improvement of proposed federal agency actions. H.R. Rep. No. 567, 97th Cong., 2d Sess. 13 (1982). Throughout the process of amending the Act in 1978, Congress remained convinced that, "in many instances[,] good faith consultation between the acting agency and the Fish and Wildlife Service can resolve many endangered species conflicts." H.R. Rep. No. 1625, 95th Cong., 2d Sess. 12 (1978). The basic premise of the 1978 amendments was to insure, "that the integrity of the interagency

---

[1] Despite oblique references to the contrary in the Secretary's Petition, the consultation duty is mandatory under the terms of the statute on both the Secretary and the agencies proposing to take an action. There is nothing "interpret[ive]," Pet. of Sec'y at 2, "up to the agency concerned," Pet. of Sec'y at 7, or "advisory," Pet. of Sec'y at 11, about either the statute or the regulations thereunder which are at issue in this case.

consultation process designated under section 7 of the act be preserved." H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978).

Section 4 requires the listing of foreign endangered species, and Section 7 requires consultation on actions affecting *any* listed species. Nothing in the language of Section 7, nor any other part of the Act, restricts the scope of this consultation duty only to federal agency actions that threaten wildlife within the United States.

Sections 9 and 11 – Like Sections 4 and 7, Section 9, 16 U.S.C. § 1538, and Section 11, 16 U.S.C. § 1540, which concern prohibitions and enforcement of the Act, explicitly govern conduct which harms listed species abroad. Section 9 prohibits the import and export of endangered species, and bars sales of such animals, "in interstate or foreign commerce." 16 U.S.C. § 1538(a)(1)(A) and (F). Section 11 provides for forfeiture of listed species illegally "exported or imported" and provides for condemnation of vessels carrying such poached animals. 16 U.S.C. § 1540(e)(4) and (5).

2. The 1978 Rule

> "After considering . . . extensive commentary, the Secretary concluded that Congress intended the duty [to consult] to extend beyond the United States . . . . "
>
> 911 F.2d at 123.

Shortly after passage of the Act in 1973, a series of consultations among the Department of Interior and other federal agencies began. *See* Defenders' App. I to the Court of Appeals at 5. The purpose of these discussions was to outline the requirements Section 7 imposed on

federal agencies and departments. *See* 43 Fed. Reg. 870 (1978).

On April 22, 1976, the Secretary issued "Guidelines to Assist Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973." *See* Defenders' App. I at 9. After revision, the Secretary issued a Notice of Proposed Rulemaking on January 26, 1977. 42 Fed. Reg. 4868 (1977). Both the Guidelines and the proposed rules explicitly stated that the consultation provisions of Section 7 applied to agency actions that may affect listed species in other countries. Proposed 50 C.F.R. § 17.91, 42 Fed. Reg. at 4871 (1977).

This consultation requirement did not affect foreign nationals or their governments. The consultation requirement applied to federal agencies in the United States when they planned actions (generally in Washington, D.C.) that could have an impact on threatened or endangered species, including those whose range was outside the United States.

The proposed rules received extensive comment and led to final rulemaking on January 4, 1978. 43 Fed. Reg. 870 (1978), codified at 50 C.F.R. Part 402 (the "1978 rule"). The final rulemaking retained the provision of the proposed rule applying Section 7 requirements to federal agency actions that may affect listed species in foreign countries. 50 C.F.R. § 402.02, 43 Fed. Reg. at 874 (1978).[2]

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[2] Today's Secretary, in his petition, seeks to create the impression that his predecessor was a rogue Secretary who ignored comments from agencies opposing application of the

(Continued on following page)

3. Congressional Adoption Of The 1978 Rule

> "In light of the fact that the 'existing law' at the time of the 1978 amendments included the prior regulation requiring consultation on foreign projects, we believe that the [Conference Report] language provides strong evidence of the conference committee's tacit approval of the prior regulation."
>
> 911 F.2d at 124.

Congress amended the Act in 1978. Pub. L. No. 95-632, § 3, 92 Stat. 3751 (1978). Congress enacted the new Section 7(a) (the current form of the consultation requirement) with the specific intention of restating existing law on Section 7 consultation requirements, including the regulations comprising the 1978 rule. The conference committee stated:

> The conferees adopted Senate language creating a new section 7(a), which essentially restates section 7 of existing law, and outlines the responsibilities of the Secretary and other Federal agencies for protecting endangered species. . . . *The Conferees felt that the Senate provision by retaining existing law, was preferable since regulations governing section 7 are now familiar to most*

(Continued from previous page)

Section 7 consultation duty to agency actions which could affect endangered species overseas. Pet. of Sec'y at 3. In fact, and as recognized by the Eighth Circuit, 911 F.2d at 123, the Secretary's own lawyers at the Interior Department's Solicitor's Office, and other agencies including the President's Council on Environmental Quality, and the National Oceanic and Atmospheric Administration, all concluded that Section 7 applied to agency actions which may affect listed species abroad.

> *Federal agencies and have received substantial judicial interpretation.*

H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978). Congress thereby affirmed the correctness of the interpretation given to Section 7 in the 1978 rule. The district court, Chief Judge Alsop, found this statement in the Conference Report to be, "the one piece of legislative history helpful to the resolution of the present controversy." 707 F. Supp. at 1085.

4. The Secretary's About-Face

> "Despite this evidence of congressional intent, in 1983, the Secretary issued a notice of proposed rulemaking to revise the [1978 rule]."
>
> 911 F.2d at 124.

On June 29, 1983, the Secretary published a Notice of Proposed Rulemaking to revise the 1978 rule. 48 Fed. Reg. 29990 (1983). The new proposed rule cut back the scope of Section 7 consultation requirements to actions proposed for the United States, its territorial waters, and the outer continental shelf. The term "action" contained in Section 7 ("Federal agency action") was defined in the 1983 proposed rulemaking to include *only* agency actions within the United States, its territorial waters, or the outer continental shelf. No legislative history or dictionary definition was cited to support this odd definitional tack.

Over comments opposing his action, on June 3, 1986, the Secretary published a final rule revising the 1978 rule. 50 C.F.R. Part 402, 51 Fed. Reg. 19926 (1986) (the "1986

rule"). In response to the comments on the proposed rule, the Secretary retained that portion of the 1978 rule applying Section 7 to federal agency actions affecting species located on the high seas. The 1986 rule rescinded that portion of the 1978 rule which applied the consultation requirements of Section 7 to federal agency actions that may affect species in foreign nations. The definition of "action" in the 1986 rule purported to limit the applicability of Section 7's consultation requirement to agency actions occurring in the United States or on the high seas. 50 C.F.R. § 402.02. This action by the Secretary represented a 180 degree turnabout from prior final agency policy.

Although consultations on federal agency actions affecting species in foreign lands have not been conducted under the 1986 rule, the Secretary continues to list endangered species whose range is outside of the United States.

5. Congressional Reaction To The Secretary's 1986 Rule

Congress has chided the Secretary about the 1986 rule. In the report of the House Committee on Appropriations accompanying the 1987 appropriations bill for the Department of the Interior, the following funding recommendation is made:

> The Committee also expects the [U.S. Fish and Wildlife] Service to continue to provide consultation on endangered species to United States agencies dispensing foreign assistance.

H.R. Rep. No. 714, 99th Cong., 2d Sess. 19 (1986). *See also* H.R. Rep. No. 171, 100th Cong., 1st Sess. 15 (1987); H.R. Rep. No. 713, 100th Cong., 2d Sess. 15 (1988). In the Senate, the Committee on Environment and Public Works, in reporting out the Endangered Species Act Amendments of 1987 (S. 675), stated:

> To the extent that [the 1986] regulations attempt to restrict the Act's requirements that each federal agency consult with the Secretary to ensure that its actions are not likely to jeopardize the continued existence and recovery of any listed species, the regulations have no statutory basis, are contrary to congressional intent, and are contrary to the law.

S. Rep. No. 240, 100th Cong., 1st Sess. 6-7 (1988). *See also* 134 Cong. Rec. S9758 (daily ed. July 25, 1988) (statement of Sen. Chafee, floor manager of S. 675). It is clear that the Congress shares none of the Secretary's apprehension about application of the Endangered Species Act to federal agency actions that may affect listed species abroad.

6. The Litigation

Defenders filed a complaint for declaratory and injunctive relief on August 27, 1986, alleging, *inter alia*, that the 1986 rule violated the Endangered Species Act. The jurisdictional basis for the Endangered Species Act claims was the citizen suit provision of that Act, 16 U.S.C. § 1540(g). First Amended Complaint at ¶1.

On February 25, 1987, the United States District Court for the District of Minnesota ordered the action dismissed, finding that Defenders lacked standing. *Defenders of Wildlife v. Hodel*, 658 F. Supp. 43 (D. Minn.

1987). In an opinion dated July 8, 1988, the United States Court of Appeals for the Eighth Circuit held that Defenders did have standing – that it had alleged substantive and procedural injuries fairly traceable to the Secretary's 1986 rule and redressable by the relief sought. *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir. 1988) (*"Defenders I"*). The substantive injury was the threat of an increased rate of extinction of endangered species absent consultation; the procedural injury was the Secretary's refusal to carry out the mandatory Section 7 consultations. The Secretary petitioned the Eighth Circuit for rehearing *en banc*, which was denied on October 14, 1988. The Secretary failed to seek further review.

On remand, Defenders moved for summary judgment on the merits of its claims. The Secretary deposed several members of Defenders and himself moved for summary judgment, though again on the issue of standing. After review of this beefed-up factual record, the district court found no genuine factual issue as to standing and denied the Secretary's motion. The district court then granted Defenders' motion for summary judgment on its Endangered Species Act claims. *Defenders of Wildlife v. Hodel*, 707 F. Supp. 1082 (D. Minn. 1989). The district court ordered the Secretary to revoke and rescind the 1986 regulation, and to publish regulations "affirmatively requiring that each federal agency consult with the defendant Secretary with respect to any agency action that may affect any endangered or threatened species, wherever found." 707 F. Supp. at 1086.

The Eighth Circuit affirmed the order of the district court in all respects. *Defenders of Wildlife v. Lujan*, 911 F.2d

117 (8th Cir. 1990) (*"Defenders II"*).[3] On standing, the Eighth Circuit conducted its own review of the fact-laden record before it, and concluded that Defenders had proven standing under all applicable precedents of this Court, including *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177 (1990). On the merits, the Eighth Circuit concluded based upon the plain language of the statute that the Secretary's Section 7 consultation duty extended to agency actions that may affect listed species abroad. The Secretary's petition for rehearing *en banc* was denied on December 10, 1990.

SUMMARY OF ARGUMENT

On standing, the fact-laden record before the Court contains testimony by Defenders' members both by affidavit and by subsequent deposition that they have visited sites of federally funded development projects overseas for the purpose of viewing and studying endangered species. Those projects have not been, and under the Secretary's 1986 rule never will be, subject to Section 7

[3] The Secretary's claim in his Petition at 19 n.6 that Defenders has not prevailed under the Endangered Species Act, 16 U.S.C. § 1540(g), but rather that, "This suit instead is one challenging agency action (the regulation) under the APA," is sophistic. The Secretary has plainly violated Section 7 of the Endangered Species Act by failing to provide the required consultation on *"any"* federal action which may affect *"any"* listed species. The district court and the court of appeals properly decided this case on its procedural (standing) and substantive aspects under the Endangered Species Act and that Act's citizen suit provision.

consultations. Defenders' members have testified about how they will be harmed by the threatened increased rate of extinction of these species if these projects go forward without consultation. Congress created the consultation process specifically to remedy this harm.

The Secretary's arguments on the merits demonstrate only that the red herring is not an endangered species. This Court has already declared that, "One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act." *TVA v. Hill*, 437 U.S. at 173. Taking the plain meaning of Sections 4 and 7 in context with the international concerns of the rest of the Act, the Eighth Circuit correctly concluded that the language of the statute showed Congress' intent to apply Section 7 to agency actions affecting protected species abroad.

ARGUMENT

I. DEFENDERS HAS STANDING

This case involves a routine challenge to the most classic "agency action" there is – a duly promulgated final rule. Environmental group plaintiffs have sued on behalf of members who have visited project sites adversely affected by the rule for the purpose of studying endangered species; those same projects have not been subjected to statutorily required environmental review, harming plaintiffs' interests. Ever since *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972), such facts have sufficed to support standing.

Article III of the constitution requires that to possess standing a plaintiff show an injury in fact, traceable to the complained-of action, redressable by the relief sought. In the Endangered Species Act, 16 U.S.C. § 1540(g), Congress has provided that, "any person may commence a civil suit . . . to enjoin any person, including the United States . . . who is alleged to be in violation of any provision of this Act . . . . " Congress thereby removed any prudential barriers to standing in this case, and indicated its intent that the Endangered Species Act be vigorously enforced, even against the United States government.

In *Defenders II*, on review of cross-motions for summary judgment, the Eighth Circuit had before it a fully developed factual record on the standing issue. The Eighth Circuit also carefully applied this Court's most recent case relating to standing in the context of motions for summary judgment, *Lujan v. NWF*, on which the Secretary relies in his Petition. The Eighth Circuit concluded, "Defenders had met its burden of proving standing at the summary judgment phase of the litigation." 911 F.2d at 120. The factual findings of the district court on standing, revisited by the Eighth Circuit, are not clearly erroneous.

Defenders has gone far beyond the steps required in any Supreme Court case to prove standing. Defenders in its amended complaint alleged, and in affidavits submitted to the district court prior to *Defenders I* provided testimony that, Defenders' members have:

- Visited sites where American-funded projects are occurring and may affect protected species;

- Studied, observed and enjoyed endangered and threatened species and their habitats for both professional and personal reasons;

- Worked both vocationally and avocationally to protect these animals; and

- Intend to return to the affected sites to study, observe, and enjoy the animals and their habitat, if any remain.

Following *Defenders I* the Secretary deposed eight of Defenders' affiants, whose depositions are a part of the record. On its own review of this developed record, the *Defenders II* panel agreed with the district court and concluded that, " . . . Defenders' members established that they had visited, and planned to visit again, the endangered species or their habitat in the areas that may be affected by specific agency projects." 911 F.2d at 120.

Defenders' member Amy Skilbred is a wildlife biologist. She has travelled to Sri Lanka specifically to seek endangered wildlife and to study wildlife habitat at the site of the United States Agency for International Development's ("AID") Mahaweli Dam project, where listed endangered species exist. Deposition of Amy Skilbred at 38-39, 42-43, Addendum to Defenders' Brief to the Eighth Circuit ("Add.") at 5-6, Defenders' App. I at 264-265. She determined she had been at the specific site of the Mahaweli project through review of federal documents and maps. *Id.* At her deposition Ms. Skilbred succinctly illustrated the nature of the harm to her interests if the Mahaweli project goes forward without the consultation which Congress has declared to be "central to the resolution of conflicts under the Act":

> Q: And for what purpose would you like to go back to Sri Lanka to visit the Mahaweli Project?
>
> A: *I'd rather go back to visit the wildlife that live in the area* of the Mahaweli Project.

Deposition of Amy Skilbred at 46, Defenders' Add. at 7, Defenders' App. I at 266 (emphasis added). She testified as to her fixed intention to return to the site. Deposition of Amy Skilbred at 46, Defenders' Add. at 7, Defenders' App. I at 266. The specific date of her return is irrelevant – if the endangered species are eradicated by the project, they will be gone for the rest of time.

Ms. Skilbred is a wildlife professional, who knows the risks to her interests of proceeding with a project like Mahaweli without a Section 7 consultation:

> Q: Do you have any knowledge of the impact of the project on the elephant and leopard that you mentioned and the other endangered species? . . .
>
> A: Yes. The effect would be largely on habitat. This is critical or important habitat for those species, especially the large species like the elephant and lion, which need a fair amount of undisturbed habitat. So the effect, the end effect may be that it diminishes the number of endangered species.

Deposition of Amy Skilbred at 43, Defenders' App. I at 266.

Former Defenders of Wildlife President Joyce Kelly testified by affidavit that she had visited the site of the Bureau of Reclamation's Aswan High Dam rehabilitation project to observe the habitat of the endangered Nile crocodile, and to seek the reptile itself, and that she

would be harmed by that U.S. agency project. The Secretary never rebutted Ms. Kelly's testimony and it stands as offered.

The record before the court of appeals demonstrated that Defenders' members have a personal interest in Section 7 consultations being performed on federal agency actions which may affect listed species overseas.

In *Defenders II* the Secretary chose not to argue the issues of traceability and redressability. He now seeks to inject those issues into the litigation in his Petition to this Court. Ironically, the Secretary's own Petition undermines his causation argument, as he describes at length the Section 7 consultation process and the requirements it imposes on federal agencies to insure that their actions do not jeopardize listed species. *See* Pet. of Sec'y at 20-21 and n.7.

In order to demonstrate traceability and redressability, plaintiffs seeking to force a governmental entity to perform a statutorily required study need not prove what the study's outcome will be – such a requirement would illogically force the plaintiff to perform the very study the government has been derelict in conducting. *City of Davis v. Coleman*, 521 F.2d 661, 670-71 (9th Cir. 1975); *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 428 (1st Cir. 1983); *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1380 (9th Cir. 1986). There is no split among the circuits on this question.

In the case of Section 7 consultations, the precise harm that a project will cause cannot be known with certainty until the consultation process occurs. If, as the Secretary wishes, the courts withhold judicial review of

agency action until the action has jeopardized an endangered species, it will be too late – the wildlife will be gone forever.

In *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982), this Court held that:

> [A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury.

(Emphasis in original; citations omitted.) In *TVA v. Hill*, 437 U.S. at 178, this Court held that the purpose of the Endangered Species Act was, "[t]he institutionalization of . . . caution," quoting H.R. Rep. No. 412, 93rd Cong., 1st Sess. 4-5 (1973). Congress created the Section 7 process to provide this institutionalized caution. In *Defenders I* the Eighth Circuit held that Defenders had alleged a threat of an increased rate of extinction of endangered species absent consultation, and a procedural harm from the failure of the Secretary to conduct Section 7 consultations. 851 F.2d at 1039-1041. In *Defenders II*, on review of a factually developed record, the Eighth Circuit concluded that Defenders had proven these harms. 911 F.2d at 120.[4] Compelling the Secretary to conduct Section 7 consultations on agency actions which may affect endangered or threatened species abroad will provide the element of

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[4] The argument of the Secretary that the Eighth Circuit has read a supposed "geographical nexus" requirement out of the law on procedural injury, Pet. of Sec'y at 9, is irrelevant in light of the proof that Defenders' members have indeed visited sites of federally funded development projects for the purpose of observing endangered animals and their habitat.

"institutionalized caution" that will redress Defenders' injury stemming from the threat of an increased rate of extinction of listed species, and will (obviously) redress the procedural harm which Defenders has suffered.[5] Defenders has standing.

II. SECTION 7 APPLIES TO AGENCY ACTIONS WHICH MAY AFFECT ENDANGERED SPECIES ABROAD

The court of appeals properly held that the plain language of the Endangered Species Act demonstrated Congress' intent that Section 7 consultations be performed on agency actions which may affect listed species abroad. 911 F.2d at 123. In this situation the court of appeals owed no deference to the Secretary's unlawful construction of the Act. *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984).

The key to this case is the relationship of the Section 4 listing requirement to the Section 7 consultation duty. Section 4 requires the Secretary to list foreign endangered

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[5] The Secretary's contention in his Petition at 15 that federal action agencies could simply ignore the results of a Section 7 consultation and proceed with an unmodified project which would jeopardize an endangered or threatened species is wrong. To the extent that the appellate cases cited by the Secretary imply that conclusion, *TVA v. Hill* has clearly made such decisions bad law. In *TVA v. Hill*, 437 U.S. at 186 n.31, this Court stated that nothing in the Act's legislative history supported such a conclusion, and that an agency which ignored the results of a Section 7 consultation would be susceptible to an action for injunctive relief brought either by the Secretary or by any person under 16 U.S.C. § 1540(g).

species, and he does so. Almost half of all species listed pursuant to Section 4 have been foreign to the United States. *See* 50 C.F.R. § 17.11. Section 7 requires "*[e]ach*" federal agency to consult on "*any* action" to insure that such action does not jeopardize "*any* endangered species or threatened species." By Section 4 of the Act, endangered and threatened species specifically include species whose range is outside the United States. The Act, on its face, leaves no room for argument. *See TVA v. Hill*, 437 U.S. at 173, and 184 n.29. As the district court held:

> The language and mandate is all inclusive; it could not be more broad. Consultation must occur whenever an action endangers *any endangered species*. Endangered species exist outside the boundaries of the United States and high seas, therefore, consultation must occur if an action in a foreign land affects an endangered or threatened species there.

707 F. Supp. at 1084-85 (emphasis by the court). Congress directed the Secretary to list species within and without the United States and to consult on "any actions" affecting "any" such species.

But the Eighth Circuit did not stop with the plain language of Section 7. It fully considered the argument of the Secretary that he possessed the discretion to disobey plain statutory language:

> It cannot be denied that Congress has chosen expansive language which admits to no exceptions. . . . We recognize, however, that the use of all-inclusive language in this particular section of the Act is not determinative of the issue. *See Foley Bros. v. Filardo*, 336 U.S. 281, 287-88 (1949); *United States v. Mitchell*, 553 F.2d 996, 1003-04

> (5th Cir. 1977). We must search the Act further for clear expression of congressional intent.

911 F.2d at 122. The court of appeals then analyzed the balance of the statute to ascertain the commitment Congress made to worldwide preservation of endangered species when it passed the Endangered Species Act.

The Eighth Circuit also reviewed the legislative history of the 1978 amendments to the Act, in which the Conference Committee indicated that Congress desired to retain existing law on Section 7 consultations (including the Secretary's earlier regulatory ruling that Section 7 *did* apply to federal agency actions affecting species abroad) because regulations governing the consultation process were by then well known to federal agencies. 911 F.2d at 124. Upon careful review of the administrative process leading to the 1978 rule, the court of appeals concluded:

> In light of the extensive commentary made by numerous agencies on the issue, however, we believe that it is highly unlikely that Congress was unaware of this state of the law.

911 F.2d at 124. This legislative history was not necessary to the Eighth Circuit's decision, but does provide useful confirmation that Section 7 means what it says.[6]

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[6] The Secretary's citations to the statements of individual legislators on the supposed domestic orientation of Section 7, Pet. of Sec'y at 27-28 and nn.11 and 12, are of little consequence in light of the language of the Conference Report, the most authoritative source of legislative history after the statute itself. *See, e.g., Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981). In any event there are plenty of floor statements recognizing the worldwide scope of the Endangered Species Act.

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The statutory arguments offered by the Secretary in support of his 1986 rule were all thoroughly considered and disposed of by the Eighth Circuit. The overriding problem with the Secretary's statutory arguments, as the Eighth Circuit recognized, 911 F.2d at 123, is that they wrongly attempt to compartmentalize a statute which must be read as a whole. *TVA v. Hill*, 437 U.S. at 184.

- **The Critical Habitat Designation Clause Of Section 4 Does Not Demonstrate A Domestic Intent For Section 7 Consultations.**

Whether or not critical habitat is designated in foreign countries has no bearing on this case. The issues of critical habitat designation and consultation are statutorily distinct, and the Secretary misanalyzes the statute when he argues otherwise. *See* Pet. of Sec'y at 2-3, 23. The Secretary's discussion of critical habitat ignores Section 4, the section of the Act under which critical habitat is actually designated (not Section 7, as the Secretary would have the Court believe). Under Section 4(b)(1), 16 U.S.C. § 1533(b)(1), the Secretary is to list species as endangered or threatened, "solely on the basis of the best scientific and commercial data available to him . . . after taking into account those efforts, if any, being made by any . . . foreign nation . . . to protect such species . . . within any area under its jurisdiction." The statute creates a

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See, e.g., 124 Cong. Rec. H38126 (daily ed. Oct. 14, 1978) (Rep. Dingell); *id.* at H38132 (Rep. Murphy); 119 Cong. Rec. H30165 (daily ed. Sept. 18, 1973) (Rep. Grover); 124 Cong. Rec. S21143 (daily ed. July 17, 1978) (Sen. Nelson).

different standard in Section 4(b)(2), 16 U.S.C. § 1533(b)(2), for critical habitat designation, wherein "economic impact[s], and any other relevant impact[s]," of designating an area as critical habitat may be considered. Section 4(b)(2) contains no reference at all to "foreign nations."

Because critical habitat designation and species listing occur under different statutory standards in Section 4, the issue of whether or not the Secretary should designate critical habitat abroad is analytically distinct. In the past, the Secretary has recognized this distinction. *See* Gov't C.A. App. at 21; 42 Fed. Reg. at 4869.

- **The Section 7 Exemption Procedure Demonstrates An International Intent For Consultations.**

Nothing in the exemption provisions of Section 7(e)-(p), 16 U.S.C. § 1536(e)-(p), implies a domestic limitation to the consultation provision of Section 7(a)(2). The statutory language of the exemption clauses provides that, " . . . the Governor of the State in which an agency action will occur, *if any*, . . . may apply to the Secretary for an exemption . . . . " 16 U.S.C. § 1536(g)(1); (g)(2)(B)(1)(i) (emphasis added). The "Governor . . . *if any*" language clearly envisions the statute encompassing agency actions that would not affect any state's governor, such as those affecting wildlife abroad. The Secretary's argument that the *if any* "phrase may simply assume coverage of activities on the high seas . . . . " Pet. of Sec'y at 24 n.9, strains unnecessarily the statutory language. The statutory language should be given its ordinary meaning – the statute covers all those agency actions that affect governors, and

all those that do not, including actions affecting listed species in other nations.

- **The Eighth Circuit's Decision Does Not Infringe Foreign Sovereignty.**

The Secretary threads the argument throughout his Petition that Congress couldn't really have meant what it said in the statute; that requiring Section 7 consultations on agency actions that may affect listed species abroad would be too great an imposition on foreign nations' sovereignty to countenance. *See, e.g.*, Pet. of Sec'y at 3, 10, 12, 22-23, 25, 29. One of the most intelligent responses to this argument was written over a dozen years ago by the Secretary's own lawyer, the Interior Solicitor, in connection with the 1978 rule.

The comments of the Interior Department's Solicitor's Office on the proposed 1978 rule were particularly well-reasoned and detailed in explaining why, based upon, "the language of the section, the wording of other portions of the Act, and the Act's legislative history," Gov't C.A. App. at 22, Section 7 required the Secretary to consult on agency actions that could affect listed species abroad. The Interior Solicitor considered the argument,

> that using the jeopardy clause [Section 7(a)(2)] to curb the overseas activities of federal agencies would infringe on the sovereignty of foreign countries by imposing on them the environmental policies of the United States . . . .

The Solicitor responded:

> With regard to infringing on Foreign sovereignty, section 7's jeopardy clause is no greater imposition of U.S. environmental policy than

> section 9's prohibitions [16 U.S.C. § 1538], or than section 11's provision for forfeiting foreign species and products if they are seized by U.S. agents. *It should be remembered that the jeopardy clause actually applies only to U.S. agencies . . . .*

Gov't C.A. App. at 24-25 (emphasis added).

The Eighth Circuit's conclusion on this issue of purported intrusion on other nations' sovereignty was well-reasoned and correct:

> We note initially that the Act is directed at the actions of federal agencies, and not at the actions of sovereign nations. Congress may decide that its concern for foreign relations outweighs its concern for foreign wildlife; we, however, will not make such a decision on its behalf.

911 F.2d at 125. Because Congress in Section 7 merely regulated the actions of its creatures the federal agencies, generic international law cases such as *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), and *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), Pet. of Sec'y at 22, do not apply.

- **The Presumption Against Extraterritorial Application Of Statutes Does Not Govern This Action.**

The Secretary relies heavily on the argument that, absent evidence of contrary congressional intent, there is a presumption of statutory construction against extraterritorial application of statutes.[7] *Foley Bros., Inc. v. Filardo,*

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[7] Defenders has throughout this litigation maintained that the whole question of "extraterritoriality" was the biggest of

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336 U.S. at 285. In *EEOC v. Arabian American Oil Co.*, 59 U.S.L.W. 4225, 4226 (U.S. Mar. 26, 1991), this Court recently stated that, "In applying this rule of construction, we look to see whether 'language in the [relevant act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control,' " (quoting *Foley Bros.*). The Eighth Circuit properly applied this standard – it examined the Endangered Species Act and found abundant evidence that Congress intended the Section 7 consultation process to apply to agency actions which may affect listed species abroad. The legislative history supported this conclusion.

In the Act, when Congress wanted to distinguish among the United States, the high seas, and foreign nations, as it did in Section 9's taking provisions, 16 U.S.C. § 1538(a)(1)(B) and (C), it did so. As Chief Judge Alsop noted:

> Section [7]'s all-inclusive language, when contrasted with the discriminatory language of section [9], cannot be considered sloppiness on the part of Congress but, rather, intentional language expressing a concern that the consultation provisions be given effect wherever agency action took place.

707 F. Supp. at 1085. Statutory presumptions cannot overcome the clear requirements of the Endangered Species

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the Secretary's many red herring. Section 7 applies to the planning activities of U.S. agencies. There is no issue here of applying U.S. law to foreign nationals or even to American citizens overseas.

Act that all endangered and threatened species receive the same degree of protection under Section 7 from thoughtless federal agency actions that may exterminate them from the earth.

CONCLUSION

For all of the reasons stated above, this Court should deny the Secretary's petition for a writ of certiorari.

April 1991

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1990

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,
PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1424

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondents challenge an interpretation of Section 7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1536(a)(2), that is set forth in a regulation issued by the Secretary of the Interior. We explain in the certiorari petition (at 13-20) that respondents fail to satisfy the bedrock standing requirements of Article III of the Constitution, and that the court of appeals' holding to the contrary squarely conflicts with decisions of this Court and other courts of appeals. We also explain (Pet. 20-29) that the court of appeals' holding that Section 7(a)(2) of the ESA applies to actions in foreign countries is contrary to the presumption against extraterritorial application of federal statutes, disregards the principle of deference to the administrative interpretation, and is unsupported by the text and legislative history of the ESA. The error on the merits now is especially clear in light of *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227

(1991), which held that Title VII of the Civil Rights Act of 1964 does not apply to the conduct of American employers in foreign countries. Respondents have offered no persuasive defense of the standing and extraterritoriality rulings by the court below and no persuasive reason why this Court should decline to consider these important issues.

A. As they did in the courts below, respondents have wholly failed to establish their standing—in the abstract setting of this case—to challenge the Secretary's interpretation of Section 7(a)(2).

1. The court of appeals held that the respondent environmental organizations have standing in their own right to challenge the statutory interpretation set forth in the regulation at issue, based on the supposed "procedural" injury they will suffer if federal agencies do not consult with one another about the impact of projects in foreign countries. This is so, the court held, even if respondents' members have no geographical nexus to the site of any such overseas project and therefore will not suffer the sort of concrete environmental (or other) injury that is necessary to satisfy Article III standing requirements. Pet. App. 10a-11a, 42a-44a. We have pointed out (Pet. 18) that there is no support in the text or legislative history for the notion that Section 7(a)(2) confers "procedural" rights on environmental organizations, especially since it provides for consultation solely between federal agencies, without any mechanism for public input. We also have explained (Pet. 13, 18-19) that organizations like respondents could not in any event establish Article III standing unless they showed that they (or their members) have some concrete stake in the matter that is distinct from whatever interest they might assert in having a federal agency adhere to alleged "procedural" requirements, because "[t]his Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen* v. *Wright*, 468

U.S. 737, 754 (1984) (citing *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974), and *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982)).

Respondents make no effort to rebut our submission that neither the ESA nor Article III supports the "procedural injury" theory of standing adopted by the court of appeals. Nor do respondents deny that the court of appeals' holding in this respect squarely conflicts not only with the decisions of this Court cited above, but also with the decisions of three other courts of appeals that have limited the "procedural injury" theory of standing to a litigant "having a sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences that the project may have." *City of Los Angeles* v. *NHTSA*, 912 F.2d 478, 492-493 (D.C. Cir. 1990) (quoting *City of Davis* v. *Coleman*, 521 F.2d 661, 671 (9th Cir. 1975)); see Pet. 18 (citing cases); Br. in Opp. 20 n.4. Respondents therefore have effectively conceded that the decision below warrants review.

2. Respondents do attempt (Br. in Opp. 15-21) to defend the court of appeals' alternative holding that respondent Defenders of Wildlife has standing on the basis of injury allegedly suffered by two of its members.[1] Congress has not enacted any statutory provision authorizing a person to bring an immediate challenge to an interpretative regulation issued by the Secretary of the Interior to guide other federal agencies in the performance of

[1] Respondents contend (Br. in Opp. 20 n.4) that any error by the court of appeals on the "procedural injury" theory is "irrelevant" because the court found that two of Defenders' members have standing. As we explain in the text, the latter ruling is erroneous as well. In any event, the existence of an alternative holding below does not detract from the precedential effect of the Eighth Circuit's "procedural injury" holding, and it therefore does not eliminate the circuit conflict or reduce the substantial likelihood that the decision below will invite future suits based on hypothetical "procedural" harm, divorced from concrete injury.

their duties under the ESA. Respondents' suit therefore must arise solely under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* See Pet. 19 n.6. An APA challenge to a regulation ordinarily is not ripe until the factual components of the controversy have been fleshed out by some concrete application of the regulation to the plaintiff's situation in a manner that harms or threatens to harm him. *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177, 3190 (1990).

Here, respondents focus (Br. in Opp. 17-19) on two projects abroad, the Mahaweli Project in Sri Lanka and the rehabilitation of the Aswan High Dam in Egypt, each of which lies within an area that was once visited by a member of respondent Defenders of Wildlife. This suit, however, does not challenge the legality of any assistance furnished by the United States to those two projects or seek to terminate that assistance. Respondents instead challenge the Secretary's non-binding rule interpreting the geographic scope of Section 7(a)(2) as a general matter.[2] Respondents cite no support for their assertion (Br. in Opp. 15) that the Mahaweli and Aswan Projects have been "adversely affected by the rule." Both were begun—and Defenders' members visited the areas in which the projects are located—before the rule was issued.

Undaunted, respondents insist that they have standing because they fear that possible *future* visits to the project

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[2] Respondents misunderstand (Br. in Opp. 6 n.1, 21 n.5) the significance of our observation (Pet. 16) that the action agencies, not the Secretary, are ultimately responsible for determining what is required of them under Section 7(a)(2). We do not suggest that where Section 7(a)(2) applies, action agencies may simply ignore either their duty to consult or the results of consultation. Our point, rather, is that the federal agency responsible for a project "makes the ultimate decision as to whether its proposed actions will satisfy the requirements of section 7(a)(2)." 51 Fed. Reg. 19,928 (1986). As this Court recognized in *TVA* v. *Hill*, 437 U.S. 153, 186 n.31 (1978), the action agency may make a final decision "notwithstanding contrary advice from the Secretary of the Interior"—subject, of course, to judicial review of *that* final decision, which respondents have not sought in this case.

sites by Defenders' two members may be less satisfactory if further assistance by United States agencies is not conditioned on compliance with Section 7(a)(2). But this allegation of "injury" rests on an unacceptably attenuated chain of speculation: that the current manner in which those two projects are being carried out will actually harm endangered or threatened species (a charge that respondents have never substantiated (see Pet. 14-15)); that a revision of the interpretation embodied in the Secretary's non-binding regulation would cause the responsible action agencies to shift course; that the action agencies, after consultation, would conclude that protected species would be adversely affected by the projects as now conceived; that the action agencies would then convince the foreign governments concerned to alter the projects in a way that would mitigate the adverse effect; and that the two members of Defenders in fact would visit the project sites in the future and benefit from any incremental abundance of the species that could be attributed to the operation of Section 7(a)(2). If standing were allowed to rest on such a chain of inferences (involving independent decisions by other agencies and foreign governments not before the court), the requirements of injury-in-fact, traceability, and redressability would be rendered virtually meaningless, contrary to *Allen* v. *Wright*, 468 U.S. at 757, and *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976). The seriously erroneous decision below on standing therefore warrants review by this Court.[3]

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[3] Respondents note (Br. in Opp. 19) that although the Secretary challenged respondents' standing on traceability and redressability grounds on the first appeal to the Eighth Circuit, he did not renew that challenge on the second appeal. However, issues resolved on the prior appeal may be raised in this Court in a certiorari petition seeking review of the court of appeals' judgment on the second appeal. *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955); *Falk* v. *Brennan*, 414 U.S. 190, 194 n.7 (1973); *Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800, 817-818 (1988).

B. On the merits, respondents have fallen far short of demonstrating the "affirmative," "clearly expressed," and unambiguous congressional intent necessary to overcome the presumption against applying an Act of Congress to activities in foreign countries. See *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. at 1230-1231.

1. Respondents go so far as to suggest (Br. in Opp. 8, 27-28 & n.7) that the presumption against extraterritoriality is not even triggered here because Section 7 of the ESA, 16 U.S.C. 1536, applies only to the "planning" activities of federal agencies in the United States. It is clear, however, that respondents are attempting to "extend the protections of [the Act] beyond our territorial borders." 111 S. Ct. at 1231. Although respondents repeatedly try to convey the impression (Br. in Opp. 2, 6, 7, 8, 9, 10, 11, 15, 17, 18, 19, 20, 21, 22, 24, 26) that they seek only to compel the Secretary to adopt an interpretation of Section 7(a)(2) that does no more than require federal agencies to "consult" about projects in foreign countries, consultation is merely ancillary to Section 7(a)(2)'s substantive requirement: that each federal agency assure, "in consultation with and with the assistance of the Secretary," that any action it authorizes, funds, or carries out "is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation with the affected States, to be critical" (unless the agency has been granted an exemption). Thus, respondents necessarily are seeking to apply Section 7(a)(2)'s *substantive* requirements to activities within a foreign country. Indeed, respondents' standing to sue must rest on asserted harm to species in Egypt and Sri Lanka that allegedly would result from projects being carried out by the governments of those countries within their borders. See pages 4-5, *supra*. Accordingly, the presumption that Congress "is primarily concerned

with domestic conditions," *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949), is fully applicable to this case.[4]

2. In seeking to overcome the presumption, respondents focus (Br. in Opp. 21-22) on the references in Section 7(a)(2) to "any action" and "any endangered species"—from which respondents infer that Section 7 must apply to actions of the United States Government throughout the world. But even the court of appeals recognized that merely inclusive language of a general nature such as "any" does not rebut the presumption against extraterritorial application, Pet. App. 12a-13a (citing *Foley Bros.* v. *Filardo*, 336 U.S. at 287-288), and in *EEOC* v. *Arabian American Oil Co.*, the Court similarly declined to sustain an extraterritorial application of United States law on the basis of broad and general language defining the terms "employer" and "commerce." 111 S. Ct. at 1231-1232.[5]

Respondents point out (Br. in Opp. 5, 21-22, 24-25) that Section 4 of the Act, 16 U.S.C. 1533, requires the

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[4] By the same token, respondents are incorrect in arguing that the regulations make consultation "unavailable" (Br. in Opp. 2) with respect to overseas projects. The regulations express the Secretary's view that consultation is not required by the Act, but they in no way preclude voluntary consultation of the sort that occurred with respect to the Mahaweli Project. See Pet. 15.

[5] Respondents' focus on the phrase "any endangered species" in Section 7(a)(2) is misplaced for an additional reason. The answer to the extraterritoriality question in this case hinges on the meaning of the phrase "any action" in Section 7(a)(2). The regulation at issue interprets that phrase to encompass only agency actions "in the United States or upon the high seas," but recognizes that the protection of Section 7(a)(2) applies wherever such actions would affect "any listed species." 50 C.F.R. 402.01. Thus, the regulation indicates that Section 7(a)(2) *would* apply if an agency action in the United States or on the high seas would adversely affect a species in a foreign country—for instance, if the species is migrating or has been captured, or if the agency action has effects that spill over onto foreign soil. Respondents' repeated mischaracterization (Br. in Opp. 7, 8, 11, 12, 22, 26) of the regulation as focusing on the location of the wildlife, rather than of the agency action, simply confuses the issue.

Secretary to list species whose habitat is abroad as well as those whose habitat is in the United States. However, Section 4 undermines rather than supports respondents' position. It provides for listing species in foreign countries because of the need to designate which species will be protected by those provisions of the Act that are explicitly extraterritorial, such as the import restrictions in Section 9, 16 U.S.C. 1538, and the foreign assistance provisions of Section 8, 16 U.S.C. 1537. Section 4 therefore does not imply that *all* sections of the Act—and particularly Section 7(a)(2)—are extraterritorial in scope.

Respondents object (Br. in Opp. 24) that this interpretation "compartmentalize[s]" the Act into parts having different geographic applications, instead of reading the statute "as a whole" to apply to actions overseas. But practically in the same breadth, respondents recognize (Br. in Opp. 24-25) that Section 4(b)(1) (which governs listing of species) and Section 4(b)(2) (which governs designations of the critical habitats of listed species) do *not* have the same geographic scope, since they do not challenge tne Secretary's consistent interpretation of the latter not to apply to habitats in foreign countries. See Br. in Opp. 24-25. Moreover, as respondents concede (Br. in Opp. 28), Section 9 also draws geographical distinctions: while its prohibitions against commerce in endangered species apply to commerce within a foreign country, its prohibitions against taking of endangered species apply only within the United States and on the high seas. 16 U.S.C. 1538(a)(1); see § 3(9), 16 U.S.C. 1532(9). Respondents' contention that the overseas application of the ESA presents a unitary question based on the Act as a whole therefore cannot withstand analysis. Each provision of the Act must be considered individually.

3. Section 7, the proper focus of analysis here, does not contain the requisite "clear statement," *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. at 1235, that the duties it imposes apply to agency actions in foreign countries. Congress's failure in Section 7 "even to mention

foreign nations" or to "address[] the subject of conflicts with foreign laws and procedures," 111 S. Ct. at 1234, confirms that respondents have not rebutted the presumption against extraterritoriality. That conclusion is especially warranted here, since Congress prominently mentioned foreign nations and their concerns in other sections of the Act (see Pet. 26-27), but not in Section 7.

Indeed, as we have pointed out (Pet. 23-24), the only geographical reference in Section 7(a)(2) is to States, in the critical-habitat clause. Respondents apparently concede (Br. in Opp. 24-25) that that clause (which imposes a duty to avoid destruction or adverse modification of critical habitat)—like the requirement under Section 4(b)(2) to designate critical habitat in the first place—does not apply in foreign countries. But they cannot explain why Congress would have given a radically different geographical scope to two duties set forth in the same sentence of Section 7(a)(2): the duties to avoid jeopardy to endangered species and to avoid adverse modification of critical habitat of such species. The conclusion that Congress did not draw any such distinction is evident from the domestic focus of the provisions in subsections (e)-(p) of Section 7 for exempting an agency action from the rigid requirements of the very "no-jeopardy" clause of Section 7(a)(2) at issue here. See Pet. 24-25.[6]

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[6] Respondents assert (Br. in Opp. 23) that the Conference Committee on the 1978 amendments indicated a desire to retain the Secretary's initial interpretation that Section 7 applies to agency actions in foreign countries. But respondents cite no evidence that this interpretation was brought to the Committee's attention, let alone that it was approved by the Committee (or Congress as a whole). As we have pointed out (Pet. 28), the Committee was not focusing on the extraterritoriality question at all; it was instead considering whether to retain a statutory framework that was familiar to federal agencies and had been incorporated into regulations. The court of appeals' reference to "extensive commentary made by numerous agencies on the issue [of extraterritoriality]" (Pet. App. 17a), cited by respondents (Br. in Opp. 23), apparently was to comments submitted to the Interior Department in response

4. We have explained (Pet. 4, 12, 20-22, 28-29) that the ruling below will impose substantial burdens on the conduct of United States activities in foreign countries, including diplomacy and defense, and threatens interference with the Executive Branch's conduct of foreign affairs. Respondents' only reply (Br. in Opp. 2)—that the record in this case does not demonstrate any unacceptable burdens—is disingenuous. If respondents had brought this suit as a challenge to a specific United States-assisted project in a foreign country, the adverse foreign-relations and other implications of a judicial application of domestic environmental standards to a project undertaken by a foreign government would have been apparent. By instead bringing this case as an abstract challenge to advisory regulations, respondents have sought to prevent the real-world implications of their expansive reading of Section 7 from being fleshed out in the context of a concrete controversy. But those implications are both real and serious, and merit this Court's review, especially when coupled with the court of appeals' unprecedented and fundamentally erroneous holdings on standing.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
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MAY 1991

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to its initial interpretation (see Pet. 3). There is no evidence that similar comments were presented to Congress.

Nor is there force in respondents' argument (Br. in Opp. 23 n.6) that "plenty of floor statements recogniz[ed] the worldwide scope of the Endangered Species Act." Congress clearly intended that *some* parts of the Act would have an effect overseas. As we have shown (Pet. 27-28), however, when Members of Congress focused on Section 7, they spoke only in terms of its domestic application.

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No. 90-1424

In the Supreme Court of the United States

OCTOBER TERM, 1990

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,
PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI
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OCTOBER TERM, 1990

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JOINT APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Docket No. CV 3-86-757

DEFENDERS OF WILDLIFE, ET AL., PLAINTIFF

v.

MANUEL LUJAN, SECRETARY OF THE INTERIOR

RELEVANT DOCKET ENTRIES

Date	NR	Proceedings
		* * * * *
8-27-86	1	COMPLAINT – Summons Issued
		* * * * *
	3	PLTF. NO/MO FOR SUMMARY JUDGMENT, (no date set) W/AFF OF RICHARD DUNCAN and Exhibits (Exhibits Separate)
10-4-86	4	FIRST AMENDED COMPLAINT
10-27-86	5	PLTS NO/MO FOR SUMMARY JUDGMENT, REt. before DDA on 11-21-86 at 9:30am in ST. Paul
10-28-86	6	DEFT'S NO/MO TO DISMISS, Ret. before DDA on 11-21-86 at 9:30am in St. Paul, MN
		* * * * *
11-13-86	9	APPENDIX-VOL I AFF. OF John M. Fitzgerald and Exhibits

Date	NR	Proceedings
	10	APPENDICES – VOLS II-X, Aff. of Joyce M. Kelly W/Exh., Aff. of Elliott McClure w/exh. Aff. of Maxine E. McCloskey w/exh., Aff. of Dr. John W. Grandy w/exh., Aff. of J. Campbell w/exh., Aff. of Amy Skilbred, Aff. of Judy M. Bellairs, Aff. of Brian B. O'Nell, Aff. of Steven C. Schroer
		* * * * *
2-25-87	12	MEMORANDUM AND ORDER (DDA) that deft's motion to dismiss is granted and that pltfs' action is dismissed for lack of standing. cc:attys.
		[Stamped closed]
3-26-87	13	PLAINTIFFS' **NOTICE OF APPEAL** TO THE EIGHTH CIRCUIT COURT OF APPEALS FROM JUDGE ALSOP'S ORDER OF 2-25-87.
		* * * * *
10-31-88	16	CERTIFIED COPY OF THE MANDATE FROM THE 8TH CIR. COURT OF APPEALS (Gibson, Bowman and Wollman-J; Filed 7/08/88) THAT: The order dismissing the complaint is reversed and the case is remanded to the district court for further proceedings consistent with this opinion.
	17	CERTIFIED COPY OF THE JUDGMENT FROM THE 8TH CIR. COURT OF APPEALS THAT: It is ordered

Date	NR	Proceedings
		and adjudged that the judgment of the district court be reversed and the cause remanded to the district court for proceedings consistent with the opinion of the circuit court. MANDATE ISSUED 10/27/88
11-14-88	19	PLTFS NO/MO FOR SUMMARY JUDGMENT, Ret. before DDA on 12-2-88 at 11:00am.
	20	AFFIDAVIT II OF RICHARD DUNCAN AND PLTFS' EXHIBITS NOS. 20-28.
		* * * * *
2-9-88	24	*ANSWER* OF DEFT.
	25	DEFT NO/TAKING DEPOSITION of Steven C. Schroer on 12-14-88 in Mpls, MN.
	26	DEPT NO/TAKING DEPOSITION of Judy M. Bellairs on 12-14-88 in Mpls, MN.
		* * * * *
	29	DEFT NOTICE OF LODGING OF ADMINISTRATIVE RECORD.
12-23-88	30	DEFTS OPPOSITION TO PLTFS' MOTION FOR SUMMARY JUDGMENT.
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	33	DEPOSITION OF AMY KATRIN SKILBRED
12/29/88	34	DEPOSITION OF JOHN M. FITZGERALD
	35	DEPOSITION OF H. ELLIOTT McCLURE
	36	DEPOSITION OF MAXINE E. McCLOSKEY
	37	DEPOSITION of John W. Grandy
	38	DEPOSITION OF J. Campbell Plowden
	39	DEPOSITION OF JUDY M. BELLAIRS
	40	DEPOSITION OF STEVEN C. SCHROER
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1-11-89	43	AFFIDAVIT OF MARY SUE HALFACRE.
	44	AFFIDAVIT OF AMY K. SKILBRED.
1-9-89	45	EXHIBITS TO DEFT. REPLY TO PLTF'S OPPOSITION TO DEFT. CROSS MOTION FOR SUMMARY JUDGMENT.

Date	NR	Proceedings
1-13-89	46	MINUTES (DDA/LL) Cross motions for summary judgment-taken under advisement.
2-15-89	47	ORDER (DDA) that (1) deft's motion for summary judgment is denied; (2) plfts's motion for summary judgment is granted; and (3) the Clerk shall enter judgment as follows: **IT IS ORDERED, ADJUDGED, AND DECREED** That the Secretary of Interior shall: 1. Revoke and rescind so much of 50 C.F.R. Part 402 (1987) as limits the consultation requirement of section 7 of the Endangered Species Act, 16 U.S.C. § 1536, to federal agency action that may affect endangered or threatened species in the United States or on the high seas; 2. Publish, within thirty (30) days of the lifting of any stay of execution of this judgment, proposed regulations clearly recognizing the full mandate of section 7 of the Endangered Species Act, expressly and affirmatively requiring that each federal agency consult with the defendant Secretary with respect to any agency action that may affect any endangered or threatened species, wherever found;

Date	NR	Proceedings
		3. Publish, within sixty (60) days of the lifting of any stay of execution of this judgment, final regulations clearly recognizing the full mandate of section 7 of the Endangered Species Act, expressly and affirmatively requiring that each federal agency consult with the defendant Secretary with respect to any agency action that may affect any endangered or threatened species, wherever found.
		Execution of this judgment shall be stayed for sixty (60) days or during the course of any appeal.
	48	JUDGMENT entered.
3-9-89	49	NOTICE AND MOTION OF PLTFS. FOR ATTORNEYS' FEES, RET. 4-28-89 at 9:30 A.M. before DDA, with aff. of Brian B. O'Neill.
4-11-90	50	DEFT'S **NOTICE OF APPEAL** TO THE EIGHTH CIRCUIT COURT OF APPEALS FROM JUDGE Alsop's order of 2-15-89.

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Docket No. 89-5192MN

DEFENDERS OF WILDLIFE, ET AL., APPELLEES

v.

MANUEL LUJAN, SECRETARY OF THE INTERIOR, APPELLANT

RELEVANT DOCKET ENTRIES

Date	Filing-Proceedings
1989	
04-12	DOCKETED APPEAL
	CERTIFIED COPIES of notice of appeal, order and judgment of 2-15-89, and district court docket entries.
	* * * * *
June 30	*BRIEF OF APPELLANT w/ADDENDUM* 50 pp; w/srv: 6/29/89; 8 copies.
Jul 31	MOTION of appellant to consolidate appeals no. 89-5192 with 89-5386MN. MOTION GRANTED 8/1/89.
Aug 1	DOCKET NOTE: per conversation w/applnt, Brief of aplnt in this case covers 89-5386 as well.
Jul 31	*BRIEF OF APPELLEE* 50 pp; (srv: 7-31-89); 7 copies.

Date	Filing-Proceedings
Aug 3	DOCKET NOTE: Appellant to file suplmntl brief in 89-5386 addressing the attorney fee issue. Brief due by 8/15/89; aplee's response due 8/30/89.
Aug 3	DOCKET NOTE: Received corrected copies of appellee's brief, containing an addendum.
	* * * * *
Aug 15	*REPLY BRIEF OF APPELLANT* 21 pp; w/srv 8/14/89; 7 copies w/89-5386
	* * * * *
1990	
May 17	ARGUED AND SUBMITTED IN ST. PAUL BEFORE JUDGES J. R. GIBSON, BRIGHT AND FAGG. David C. Shilton for appellant. Brian B. O'Neill for appellee. Rebuttal by David C. Shilton. Recorded. w/89-5386
	* * * * *
Aug. 10	OPINION BY JOHN R. GIBSON PUBLISHED (w/89-5386MN)
Aug. 10	JUDGMENT: The judgment of the district court in this cause is affirmed in accordance with the opinion of this court. (w/89-5386 MN)
Aug. 21	BILL OF COSTS INCLUDING ATTORNEYS' FEES (w/attachments) (w/89-5386MN)
Aug. 20	MOTION for extension of time to file petition for rehearing of aplnt GRANTED TO 9/24/90 ON 8/24/90 w/5386

Date	Filing-Proceedings
Aug. 29	MOTION FOR EXTENSION OF TIME to file response to Bill of Cost and Attorneys' Fees GRANTED 8/30/90 to and including Sept. 7, 1990. (from aplnt.) (w/service)
Aug. 30	MOTION FOR STAY OF MANDATE from aplnt. (w/service) (w/5386)
Sept. 10	Response to Motion for Costs and Attorneys' Fees
Sept. 24	ORDER: Issuance of mandate will be stayed until 10-1-90 pending filing of a petition for rehearing or at least 7 days after any petition for rehearing is denied, if filed. UNPUB w/5386
Sept. 24	PETITION FOR REHEARING with suggestions for rehearing en banc from aplnt. (w/ser) (w/89-5386)
Nov. 8	DOCKET NOTE: Response requested from aplee. to aplnt's petition for rehearing. Due 11/19/90 (w/5386MN)
Nov. 19	RESPONSE from aplee to aplnt's petition for rehearing—to Ct.
Dec. 10	ORDER: aplnt's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judges Bowman and Beam would have granted the petition. Petition for rehearing by the panel is also denied.
Dec. 17	MOTION of appellant for stay of mandate. (w/service) (w/5386)

Date	Filing-Proceedings
Dec. 18	SUPPLEMENTAL MOTION FOR COSTS from aplee (including attorneys' fees) (w/5836) (attached affidavit in support)
Dec. 20	RESPONSE from aplnts to aplees' supplemental motion for costs and fees. (w/service)—to Ct.
Dec. 27	MEM. in opp. to mot. to stay mandate from aplee (Def. of Wildlife) (w/ser)—To Ct. (w/5386)
1991	
Jan. 7	ORDER: Motion of the government for stay of issuance of mandate has been considered by the court and is granted. The issuance of the mandate shall be stayed for ninety (90) days from Dec. 10, 1990, and if a petition for writ of certiorari is filed, until the court receives notice that certiorari has been granted or until the court receives the mandate of the Supreme Court. Mandate will issue 7 days after notification that pet. for writ of cert. will not be filed. (w/5386)
Mar. 7	RECEIVED notification from U.S. Sup. Ct. of appl. for extension of time to file pet. for writ of cert. granted to and including April 9, 1991. (w/5386)
Mar. 13	RECEIVED letter stating that the government has filed a petition for writ of certiorari in the Supreme Court on 3/11/91, per counsel.
Mar. 18	NOTICE OF FILING petition for certiorari in the Sup. Ct. of the U.S. as case No. 90-1424 on March 11, 1991. w/5386.

Date	Filing-Proceedings
May 20	ORDER received from the Sup. Ct. of the U.S. which stated that petition for writ of certiorari had been granted in case No. 90-1424 on May 13, 1991. w/5386

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS,

VS.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANT.

FIRST AMENDED COMPLAINT

Plaintiffs, for their complaint against the defendant, state and allege:

JURISDICTION

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1331(a) as the action arises under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. § 553 and 5 U.S.C. §§ 701 *et seq.*, as hereafter more fully appears. This court also has jurisdiction pursuant to 28 U.S.C. §§ 1361 and 2201. In addition, the Court has jurisdiction over citizen suits to enforce the Endangered Species Act pursuant to 16 U.S.C. § 1540(g).

PARTIES

2. Plaintiff Defenders of Wildlife is a nonprofit District of Columbia corporation with its principal place of business in Washington, D.C.

3. Friends of Animals and Their Environment is an unincorporated association with its principal place of business in Minneapolis, Minnesota.

4. The Humane Society of the United States is a nonprofit District of Columbia corporation with its principal place of business in Washington, D.C.

5. Plaintiffs, and each of them, are organizations formed for, among other reasons, the preservation of endangered and threatened species of wildlife. Plaintiffs and their members have an interest in the enforcement and administration of the Endangered Species Act, 16 U.S.C. §§ 1531 **et seq**., and observe and enjoy, when possible, endangered and threatened species of wildlife, including those species whose primary ranges are outside the United States. The actions of the defendant harm in fact the plaintiffs by, among other ways, increasing the rate of extinction of endangered and threatened species, species whose presence on earth the plaintiffs observe and enjoy.

6. Defendant Hodel is Secretary of the Department of Interior. He is charged with implementation of the Endangered Species act, 16 U.S.C. §§ 1531 **et seq**.

THE LISTING OF ENDANGERED SPECIES UNDER THE ENDANGERED SPECIES ACT

7. The Endangered Species Act ("the Act"), 16 U.S.C. §§ 1531 **et seq**., was enacted in 1973. All Federal agencies are commanded by the Act to use their authority in furtherance of the purposes of the Act. 16 U.S.C §§ 1531(c) and 1536(a) (1).

8. The Act, in its language and legislative history, contains a commitment by the United States to the international conservation of endangered and threatened species. *E.g.*, 16 U.S.C. § 1531(a) (4).

9. Section 4 of the Act, 16 U.S.C. § 1533, requires the Secretary of the Interior to list species of wildlife or plants endangered or threatened with extinction. The Secretary's regulations with regard to listing, and the lists of species themselves, may be found at 50 C.F.R. Part 17.

10. Under Section 4 and regulations published pursuant thereto, both domestic species and species whose primary range is foreign to the United States are listed if endangered or threatened. As of January 1986, of 883 species listed as endangered or threatened, 493 were species whose primary range lay outside the United States. In addition, there are both endangered and threatened species with ranges that span United States and foreign borders.

11. Neither Section 4 of the Act, nor any other section, contains distinctions between domestic species and foreign threatened or endangered species with respect to the requirements for listing, or the degree of protection to be afforded listed species. The Secretary has listed and continues to list species whose primary range is outside the United States.

SECTION 7 OF THE ACT
AND THE REQUIREMENT OF CONSULTATION

12. Under Section 7(a) of the Act, 16 U.S.C. § 1536(a), Federal agencies have a duty to consult with the Secretary of Interior to insure that agency actions are "not likely to jeopardize the continued existence of *any* endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.* * *." 16 U.S.C §1536(a) (2) (emphasis added).

13. Nothing in the langauge of Section 7, or any other part of the Act, restricts the scope of this consultation duty to Federal agency actions occurring within the United States.

14. After consultation with an affected agency, the Secretary must issue an opinion ("no jeopardy" opinion) detailing the effect of the proposed Federal agency action on endangered or threatened species or on their critical habitat, and proposing acceptable alternative action if the proposed action is found to threaten said species. 16 U.S.C. § 1536(b).

15. All species listed pursuant to Section 4 of the Act are protected under the consultation and no jeopardy opinion provisions of Section 7. This protection applies to threatened or endangered species listed whose primary range falls within the United States and those listed species whose primary range falls within foreign nations.

DEVELOPMENT OF SECTION 7 CONSULTATION REGULATIONS

16. Shortly after passage of the Act in 1973, a series of consultations within the Department of Interior and among Interior and other Federal departments and agencies began. The purpose of these discussions was to outline the requirements Section 7 imposed on Federal agencies and departments.

17. The Fish and Wildlife Service (FWS) was designated the lead agency within the Department of Interior for formulating regulations to implement Section 7; the National Marine Fisheries Service (NMFS) was designated the lead agency within the Department of Commerce to carry out those Section 7 responsibilities vested in

the Department of Commerce. [For purposes of this complaint, the terms "Fish and Wildlife Service" or "FWS" will incorporate joint actions of FWS and NMFS.]

18. On April 22, 1976, "Guidelines to Assist the Federal Agencies in Complying With Section 7 of the Endangered Species Act of 1973" were transmitted to all Federal agencies by the Fish and Wildlife Service. After revision of these Guidelines based on Federal agency comments, the FWS issued a Notice of Proposed Rulemaking on January 26, 1977. 42 Fed. Reg. 4868 (1977).

19. These proposed rules explicitly stated that the consultation provisions of Section 7 applied to actions taken by a Federal agency in a foreign nation. This would protect species listed pursuant to Section 4 whose primary range is in a foreign nation from actions by a United States agency or actions financed with United States money that might jeopardize the existence of said species. Proposed 50 C.F.R. § 17.91, 42 Fed. Reg. at 4871 (1977).

20. The consultation requirement applied to Federal agencies in the United States planning actions having an impact on threatened or endangered species whose primary range was outside the United States.

21. The proposed rules received extensive comment and led to final rulemaking on January 4, 1978. 43 Fed. Reg. 870 (1978) (the 1978 rule).

22. The final rulemaking retained in full the provision of the proposed rule applying Section 7 requirements to Federal agency actions occurring in foreign countries. 50 C.F.R. § 402.02, 43 Fed. Reg. at 874 (1978).

23. Congress in 1978 amended the Act, Nov. 10, 1978, P.L. 95-632, § 3, 92 Stat. 3752. In so doing, Section 7 was lengthened considerably. New Section 7(a) [the current form of the consultation requirement] was enacted with

the intention of restating existing law on Section 7 consultation requirements, including the regulations at 50 C.F.R. Part 402, 43 Fed. Reg. 870 (1978).

DEVELOPMENT OF THE 1986 RULE

24. On June 29, 1983, the Fish and Wildlife Service published a Notice of Proposed Rulemaking to revise 50 C.F.R. Part 402. 48 Fed. Reg. 29990 (1983). The proposed rule cut back the scope of Section 7 consultation requirements to Federal agency actions planned for the United States, its territorial waters, and the outer continental shelf.

25. Similarily, the term "action" contained in Section 7 ["Federal agency action"] was defined by the FWS for the first time in the 1983 proposed rulemaking. The new definition considered only agency actions within the United States, its territorial waters, or the outer continental shelf to be "actions" within the meaning of the consultation requirement of Section 7.

26. The effect of these proposed changes was to deny to species listed by the Fish and Wildlife Service pursuant to Section 4 of the Act whose primary range is outside the United States the protection those species had received both under the 1978 rule and the Act.

27. Several commenters, including Defenders of Wildlife, asserted that the rule should continue to apply to agency actions occurring in foreign countries. In addition, an Interagency Task Force formed pursuant to the International Environment Protection Act of 1983, 22 U.S.C. § 2151q, cited Section 7(a) (2) of the Endangered Species Act in recommending that Federal agencies "should continue to adopt policies withholding support for certain types of projects that degrade or destroy fragile or protected lands" in foreign nations.

28. On June 3, 1986, FWS published a final rule revising the 1978 rule. 50 C.F.R. Part 402, 51 Fed. Reg. 19926 (1986) (the 1986 rule).

29. In response to the comments on the proposed rule, FWS retained that portion of the 1978 rule applying Section 7 to Federal agency actions on the high seas. The 1986 rule rescinded that portion of the 1978 rule which applied the consultation requirements of Section 7 to Federal agency actions in foreign nations. The definition of "action" in the 1986 rule likewise purported to limit the applicability of Section 7's consultation requirement to agency actions occurring in the United States or on the high seas.

30. The Secretary, as a matter of policy, does not require consultation on Federal actions that occur outside the United States even if those actions jeopardize the continued existence of a listed species or adversely affect its critical habitat.

31. Although consultations on Federal agency actions in foreign lands will not be conducted under the 1986 rule, FWS will continue to list species whose primary range is found outside of United States jurisdiction when those species are determined to be endangered or threatened pursuant to Section 4 of the Act.

32. FWS provided no reasoned analysis in its announcement of the final rule as to why its position of ten years was unworkable as applied to Federal agency actions planned for foreign nations, nor a reasoned analysis of the superiority or necessity of the 1986 rule with its limitations on the application of the plain language of Section 7 of the Act.

VIOLATIONS OF LAW ALLEGED

COUNT I

(Violation of the Endangered Species Act)

33. Any and all of defendant's actions in promulgating rules, or in adopting a policy, not providing endangered or threatened species listed pursuant to Section 4 of the Act whose primary range is outside the United States the full protection guaranteed them under Section 7 of the Act violate Section 7(a) of the Act, 16 U.S.C. § 1536(a).

34. Implementation of defendant's regulations, 50 C.F.R. Part 402, 51 Fed. Reg. 19926 (1986), or his policy, threatens imminently and irreparably the interests of plaintiffs and the public. Their interest in the continued application of Section 7 of the Act to agency actions abroad can only be protected if defendant's 1986 rule is declared illegal and its implementation is enjoined by this Court. Plaintiffs have no adequate remedy at law.

COUNT II

(Violation of the Administrative Procedure Act)

35. Any and all of defendant's actions in authorizing a rescission of the 1978 rule and its replacement with current 50 C.F.R. Part 402, 51 Fed. Reg. 19926 (1986), and in adopting his non-consultation policy, are arbitrary, capricious, an abuse of discretion, and contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 553, and 5 U.S.C. §§ 701 *et seq*.

36. Issuance of the aforesaid 1986 rule, 50 C.F.R. Part 402, 51 Fed. Reg. 19926 (1986), constitutes a final agency action and threatens imminently and irreparably the interests of plaintiffs and the public and should be declared illegal. Plaintiffs have no adequate remedy at law.

COUNT III
(Violation of Secretary's Statutory Duty to Conserve Endangered or Threatened Species)

37. Any and all of defendant's actions in promulgating 50 C.F.R. Part 402, 51 Fed. Reg. 19926 (1986), and in adopting his non-consultation policy, violate the declared policy of the Act to "conserve endangered and threatened species," 16 U.S.C. § 1531(c) and § 1536(a) (1), when these species primary ranges are found in foreign lands and may be affected by Federal agency action.

38. The aforesaid failure constitutes an imminent and irreparable threat to plaintiffs' interests and should be declared illegal. Plaintiffs have no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for the following relief:

A. That the Court adjudge and decree defendant's aforesaid acts in promulgating the 1986 rule eliminating application of Section 7 of the Act to Federal agency actions planned for foreign nations illegal as alleged herein.

B. That the Court provide supplemental relief by preliminarily and permanently enjoining defendant and his agents or employees from implementing the newly promulgated regulations.

C. That the Court direct defendant to perform the duties owed plaintiffs, specifically to publish forthwith regulations requiring federal agencies to consult on agency actions abroad that may affect endangered or threatened species.

D. That plaintiffs herein recover from defendant the costs of this citizen suit, including reasonable attorney's fees, as provided for under the Endangered Species Act, 16 U.S.C. § 1540(g) (4) and the Equal Access to Justice Act, 28 U.S.C. § 2412(d).

E. That plaintiffs have such other, further, and different relief as the nature of this case may require or the Court may deem just and appropriate.

Dated: October 7, 1986

/s/ Brian B. O'Neill
BRIAN B. O'NEILL
STEVEN C. SCHROER
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2300 Multifoods Tower
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33 South Sixth Street
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UNITED STATES DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington, D.C. 20240

Dec. 3, 1974

In Reply Refer To:
FWS/SE

Dear

On December 28, the President signed the Endangered Species Act of 1973. This Act is looked upon as one of the strongest pieces of conservation legislation yet enacted. It implements several international agreements, establishes a strong Federal program, mandates close cooperation among Federal agencies and encourages the initiation or expansion of complementary programs at the State level. The Act designates the Departments of Interior and Commerce as the lead agencies for its implementation. Copies of both the Act and the current list of endangered species are enclosed.

This new Act provides much broader coverage than the Act it repealed—The Endangered Species Conservation Act of 1969. Among other things it:

—gives consideration to *all* animal life. The earlier statute considered only vertebrates, molluscs, and crustaceans; thus, omitting from consideration the vast majority of the species with whom we share this planet and who play major roles in the earth's ecosystems;

—recognizes two degrees of threat. The earlier statute addressed only species that were "Endangered"—i.e., "threatened with extinction." The new law retains that

classification but adds another category of "Threatened species" – i.e., "a species which is threatened with *becoming* Endangered." This new authority enables recognition of species that are heading toward serious trouble and enables implementation of preventative action *before* that critical stage is reached. Such action not only enhances the likelihood of the successful recovery of that species but enables the use of less drastic – and usually more economical – techniques to bring about such recoveries;

– recognizes the need to consider "populations" as well as species or subspecies. The earlier statute recognized only described species or subspecies rather than the more ecologically valid concept of population conservation embodied in the new Act. This authority, when coupled with the ability to determine "Threatened" as well as "Endangered" species, enables the application of protective regulations where and to the degree needed;

– recognizes the importance of the continued existence of all wild plants as well as wild animals. The Act provides authority to develop lists of Endangered and Threatened plants and for the Secretary of the Smithsonian Institution to coordinate, within one year, a review of Threatened or Endangered plants and to recommend methods for conserving them – including recommendations for legislative action if such is necessary;

– implements the Convention on International Trade in Endangered Species of Wild Fauna and Flora. Enactment of this law enabled the United States to become the first nation to ratify that treaty and to begin setting up mechanisms for cooperation with other Nations as they complete their ratification procedures;

- makes Federal employees subject to prosecution for violating, or causing a violation, of section 9 of the Act, and gives any citizen standing to enjoin such actions;

- authorizes Federal agency heads to cancel licenses, contracts, or other agreements authorizing the use of Federal lands by persons convicted of criminal violations of the Act;

- requires a high degree of concern on the part of Federal agencies in insuring that their activities do not amplify the threat faced by *any* Threatened or Endangered Species. Section 7 of the Act states:

> "...The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical."

Authority for coordinating the Department of the Interior's responsibilities has been delegated through the Assistant Secretary for Fish and Wildlife and Parks to the Fish and Wildlife Service. Similar authority for the Department of Commerce has been delegated to the National Marine Fisheries Service.

In order to bring about the "consultation and assistance" between our agencies required by the Act, we would appreciate your designation of a liaison officer with whom our personnel can communicate. That individual should be authorized to represent your position on matters pertaining to the implementation of the Act. Please advise both (1) the Director, Fish and Wildlife Service, United States Department of the Interior, Washington, D.C. 20240 and (2) the Director, National Marine Fisheries Service, United States Department of Commerce, Washington, D.C. 20231 of the name, title, address, and telephone number of your designee.

We plan to host a day-long conference in Washington early in 1975 to which these designees will be invited and at which questions can be resolved and working procedures can be established.

We are looking forward to working with your personnel in implementing the Endangered Species Act of 1973.

Sincerely yours,

/s/ Rogers CB Morton
Secretary of the Interior

/s/ Frederick B. Gelt
Secretary of Commerce

Enclosure

IDENTICAL LETTERS FORWARDED TO THE ATTACHED LIST OF PEOPLE

UNITED STATES DEPARTMENT OF THE INTERIOR
Fish and Wildlife Service
Washington, D.C. 20240

In Reply Refer To:
FWS/AFA

Memorandum April 22, 1976

To: All Federal and State agencies concerned with Section 7 of the Endangered Species Act of 1973

Dear Cooperator:

Enclosed are "Guidelines to Assist Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973." The guidelines were developed by the U.S. Fish and Wildlife Service, U.S. Department of the Interior, and the National Marine Fisheries Service, U.S. Department of Commerce, with the assistance of an Interagency Ad Hoc Committee composed of representatives from 11 Federal agencies and departments.

The guidelines are intended to be broad and flexible so that they may be used by the various Federal agencies and departments to prepare internal guidelines and procedures they feel necessary to fulfill the requirements of section 7 of the Endangered Species Act of 1973. They are not intended to preempt or hinder actions or other statutory obligations of your agency or department, but rather to assist you in meeting the requirements of the Act. Further, you may use these guidelines, in whole or in part, at your discretion subject to the requirements of section 7.

These guidelines are currently receiving a "Quality of Life Review" by the Office of Management and Budget. If you have comments that you would like considered in this Review, please forward them to the Director, U.S. Fish and Wildlife Service or National Marine Fisheries Service, and they will be forwarded to OMB.

In addition, the guidelines will provide a starting point from which regulations will be developed. Standard rulemaking procedures will be used for the regulations which will provide for comments by your agency or department before final regulations are published in the *Federal Register*. Should you have questions or comments, please contact us, and we will be glad to provide appropriate assistance.

The U.S. Fish and Wildlife Service and the National Marine Fisheries Service, to the extent we are able, stand ready to assist your agency or department in meeting the requirements of the Act. It is our sincere belief that only through an atmosphere of close coordination and cooperation between the Federal agencies and departments can the intent of the Endangered Species Act of 1973 be met – to provide programs of conservation and protection for Endangered species and Threatened species and the ecosystems upon which they depend so that these species can be restored as viable components of the environment.

/s/ Lynn A. Greenworth
Director, U.S. Fish and
Wildlife Service

/s/ Robert H. Shenning
Director, National
Marine Fisheries
Service

Enclosure

GUIDELINES TO ASSIST FEDERAL AGENCIES IN COMPLYING WITH SECTION 7 OF THE ENDANGERED SPECIES ACT OF 1973

The following guidelines were prepared by the United States Fish and Wildlife Service (FWS), U.S. Department of the Interior, and the National Marine Fisheries Service (NMFS), U.S. Department of Commerce to assist the Federal Departments and agencies (hereinafter referred to as Federal agency or agencies) in meeting their responsibilities under section 7, 16 U.S.C. §§ 1537, of the Endangered Species Act of 1973 (hereinafter referred to as the Act), 16 U.S.C. §§ 1531-1543 (Supp. III, 1973).

The guidelines were developed at the request of Federal agencies at a May 29, 1975, conference on the Act and its implication on Federal activities programs. In response to the request, an Ad Hoc Interagency Committee was convened by the Directors, FWS and NMFS, to advise the two Services in developing the necessary guidance. The Committee was composed of representatives from 11 Federal agencies who were instrumental in providing advice necessary to reflect the guidance needs for a wide range of Federal activities and programs.

The guidelines are intended to furnish a broad framework within which Federal agencies may prepare internal procedures to guide their activities or programs in fulfilling the requirements of section 7 of the Act. The guidelines also are intended to be sufficiently flexible so that they can be applied to the diverse activities and programs undertaken by Federal agencies which may have an effect upon Endangered or Threatened species (hereinafter referred to as listed species) or their habitats. Activities and programs as used herein apply to all actions authorized, funded, or carried out by Federal agencies, examples of which include but are not limited to, (1) programs or ac-

tivities intended to conserve listed species or their habitats, (2) promulgation of regulations which would beneficially or detrimentally affect listed species or their habitats, (3) granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid, which might affect listed species or their habitats, or (4) activities or programs directly or indirectly, causing physical modifications to the land, water, or air within the range or habitat area of listed species.

The respective jurisdictions of the Secretaries of Interior and Commerce for listed species of fauna were established by Reorganization Plan Number 4 of 1970, 5 U.S.C. App. (1970). A Memorandum of Understanding, dated August 28, 1974 (copy attached), further defines the jurisdictional responsibilities of the two Services. The FWS and the NMFS have been delegated the responsibilities of the Departments of Interior and Commerce for implementing the Act and their responsibilities were identified in the December 3, 1974 letter to the various Federal agencies from the Secretaries of Interior and Commerce. (Copy attached) The lists of Endangered and Threatened native and foreign fauna under the jurisdiction of the FWS and the NMFS are found in 50 C.F.R. 17.11. The NMFS regulations specify those species of fauna under its jurisdiction and are contained in 50 C.F.R. 22.33, 39 Fed. Reg., 41367-41377, November 27, 1974. Jurisdiction over Endangered and Threatened flora is divided among the Secretaries of Agriculture, Commerce, and Interior, as defined by the Act. The Secretary of Agriculture's responsibility is limited to importation and exportation of terrestrial plants. Other functions under the Act relating to terrestrial plants such as listing and section 7 consultation and assistance, and all functions relating to marine plants are the responsibilities of the Secretaries of the Interior and Commerce. No agreement is presently in effect as to

the division of these responsibilities for plants between the Secretaries of Commerce and Interior but one is expected prior to the listing of flora species.

It is not the intent or purpose of the FWS or the NMFS through the issuance of these guidelines to hinder, halt, or preempt actions or statutory requirements of other Federal agencies. Rather, the guidelines are provided only to assist the Federal agencies in meeting their responsibilities under section 7 of the Act. Furthermore, the Federal agencies are not obligated to adopt in whole or in part the guidelines presented here. They may be used by the Federal agencies at their discretion.

The consultation and assistance process proposed here is viewed as a means of providing responsible Federal agencies with the benefit of information, biological opinions, and expertise available in the FWS and the NMFS on the effects of actions upon listed species and their habitats. Such information and expertise might otherwise not come to the attention of the Federal agencies during the planning and implementation of their actions. This process is also viewed as essential for coordinating all research, investigations, studies for management or conservation programs pertaining to listed species and their habitats as well as disseminating such information throughout the government.

These guidelines are distributed to the Federal agencies for their internal guidance and will not be published in the *Federal Register*. The Federal agencies should be aware, however, that these guidelines will be used as a starting point for the development and promulgation of regulations. Rulemaking procedures will be followed which will afford all interested Federal agencies, as well as members of the public, an opportunity to comment on proposed regulations before they become final. In addition, the

guidelines do not offer guidance in respect to complying with State laws or regulations concerning listed species or species considered threatened with extinction within the States.

I. Section 7—General Parameters
   A. Scope of Section 7
      1. Section 7 applies to listed species of fauna and flora (although no flora species are presently listed, listings are anticipated by early 1976).
      2. Section 7 applies to activities and programs by Federal agencies affecting listed species in foreign countries and on the high seas, as well as in the United States. (The concept of jeopardy applies to all listed species, native and foreign. Whether the critical habitat concept applies in foreign countries or not is an unresolved question at this time).
   B. Requirements of section 7
      1. All Federal agencies, including Services, Bureaus and Offices within the Departments of the Interior and Commerce, in consultation with the FWS or NMFS and with their assistance, shall utilize their authorities in furthering the purpose of the Act.
         a. The FWS has been delegated the Secretary of Interior's primary responsibility for implementing the Act by 242 DM 1 and 632 DM 1.4. The October 16, 1974, memorandum from the Secretary of Interior to Assistant Secretaries and Heads of Bureaus and Offices further defines the responsibilities of the FWS.

b. The NMFS has been delegated the Secretary of Commerce's responsibility for implementing the Act by memoranda dated February 4, 1974, in which the Secretary delegated his authority to the Administrator of the National Oceanic and Atmospheric Administration and such authority was then delegated to NMFS by Memorandum, dated March 11, 1974.

c. The December 3, 1974, letter from the Secretaries of Interior and Commerce provided additional definition of the responsibilities of the FWS and the NMFS in coordinating and implementing the Act for the respective Departments.

2. Within the limits or opportunities of their authorities, Federal agencies shall carry out programs for the conservation of listed species.

3. Federal agencies shall not authorize, fund, or carry out actions that will result in jeopardizing the continued existence of listed species.

4. Federal agencies shall not authorize, fund or carry out actions that will result in the destruction or adverse modification of the habitats of listed species that have been determined critical by the Secretary, through the Director, FWS or NMFS, after consultation as appropriate, with the affected States.

It is recognized that modification of critical habitat can have beneficial or detri-

mental effects on listed species. It was clearly the intent of Congress that "modification" as used in section 7 applies to *adverse* modification. On the other hand, carrying out programs for the conservation of listed species, as required in section 7, could include beneficial habitat modifications. In either case, consultation should be undertaken to insure that available information and expertise can be provided. After consultation, if an activity or program is determined to be beneficial for the habitat of a listed species, but its implementation could consitute a violation of section 9 of the Act, a permit should be requested pursuant to section 10(a) of the Act and applicable FWS or NMFS regulations.

C. Working Concepts

The following are considered to be "working" concepts that can be used to clarify key terms in section 7. It must be emphasized that these are not definitions but are concepts to assist the Federal agencies in clarification of the terms.

1. "Critical Habitat" – means any air, land, or water area including any elements thereof which the Secretary, through the Director, FWS or NMFS, has determined is essential to the survival of wild populations of a listed species or to its recovery to a point at which the measures provided pursuant to the Act are no longer necessary (hereinafter referred to as recovery). Determinations will be published in the *Federal Register*.

2. "Jeopardize the Continued Existence of" – means any action which reasonably would be expected to result in the reduction of the reproductive ability, numbers, or distribution of a listed species to such an extent that the loss would pose a threat to the continued survival or recovery of these species in the wild. This reduction in reproductive ability, numbers, or distribution of listed species would be expected to vary from species to species. In some cases, such as the Whooping crane or Hawaiian crow, it could be a single individual, in other cases, such as an endangered invertebrate, it could be as high as scores, hundreds, or more.
3. "Destructon or (Adverse) Modification" – means any act which would have a deleterious effect upon any of the constituent elements of critical habitat which are necessary to the survival or recovery of such species, and such effect is likely to result in a decline in the numbers of the species.
   a. Constituent elements of critical habitat include, but are not limited to land, air, and water area, physical structure and topography, flora, fauna, climate, human activity, and the quality and chemical content of soil, water, and air.
   b. The requirements for survival or recovery of listed species include space for normal growth, movement or territorial behavior; nutritional requirements such as food, water, minerals;

sites for breeding, reproduction, or rearing of offspring; cover shelter; or other biological, physical, or behaviorial requirements.

D. Application of section 7 to Existing Activities and Programs

1. In considering whether section 7 applies to actions in the planning, review, or implementation stage but not completed prior to December 28, 1973, Federal agencies should determine if the action is (1) one undertaken by a non-Federal entity but one in which the Federal presence and control may still be felt or a Federal decision remains to be made which would permit or prohibit a non-Federal entity to proceed with a project, or (2) one being undertaken by or on behalf of a Federal entity and substantial work remains to be done which would, independent of the effect of earlier work performed, in and of itself jeopardize the continued existence of a listed species or modify or destroy critical habitat of a listed species. If the Federal presence and control remains to be felt, the Federal decision remains to be made, or such work on a Federal project remains to be performed, then the requirements of section 7 should be satisfied.

2. The requirements of section 7 shall be applied to activities and programs of Federal agencies presently in progress and initiated on or after December 28, 1973, that could affect listed species or their habitats. The

concerned Federal agency should request assistance and consultation on activities on programs begun after December 28, 1973 as contained in these guidelines.

II. Determination of Critical Habitat

A. General Requirements

1. It is the responsibility of the Secretary through the Director, FWS or NMFS, to make the final determination of critical habitat for the listed species or for amending or terminating such determinations. All determinations will be made using rulemaking procedures which include notifying the Governors of the affected States and publishing in the *Federal Register* all proposed and final determinations of critical habitat.
2. Upon finding that an emergency exists (e.g., an action is about to take place that will pose a significant risk to the well-being of a listed species by the destruction or adverse modification of its habitat), the FWS or the NMFS may make an Emergency Determation of Critical Habitat. The Emergency Determination will be published in the *Federal Register* and will remain in effect for a maximum of 120 days. A determination of critical habitat using the rulemaking procedures stated in section II.A.1 will be initiated during the 120-day period.

B. Procedures for Determining Critical Habitat

1. The FWS or the NMFS will seek consultation, as appropriate, with the affected

States in which the listed species' habitat occurs.

2. Prior to publishing a proposed rulemaking determining critical habitat for a listed species in the *Federal Register,* the FWS or NMFS will request information, assistance, and recommendations from Federal agencies with jurisdiction over lands, under consideration for such determination. The request will be in writing to such Federal agencies asking that they provide the FWS or NMFS with substantive comments and recommendations, based upon their biological expertise, on the habitat under consideration and how that habitat satisfies and fulfills the constituent elements of critical habitat enumerated in section I.C.3.a. of these guidelines.
3. After reviewing and incorporating, to the extent possible, the comments and recommendations of such agencies, and prior to publishing a proposed rulemaking in the *Federal Register* the FWS or NMFS will write the Federal agencies contacted under II.B.2 and notify them of the proposed critical habitat determination and the reasons for it. Following such notification, the FWS or NMFS will publish the proposed determination in the *Federal Register.*

III. Consultation and Assistance

A. Criteria for Determining the Need for Consultation and Assistance

1. It is the obligation and responsibility of Federal agencies using in-house expertise

or other suitable sources to analyze and review (screen) their activities and programs in light of the "working" concepts discussed in I.C., to ascertain if listed species or their habitats will be affected beneficially or detrimentally. If a Federal agency judges that listed species or their habitats will not be affected by agency actions, the requirements of section 7 will not apply. If it is considered likely that listed species or their habitats could be affected, or if the Federal agencies or their authorized representatives desire the assistance of the FWS or the NMFS in determining the effects of their actions, then the consultation process shall be carried out as contained in these guidelines.

2. Informal consultation can and should be initiated at the field level between the FWS, or the NMFS and the Federal agencies or their authorized representatives (e.g., contractors, researchers, etc). In most cases, this will be a continuation of field coordination and cooperation that has been established in the past. This level of communication will be particularly useful for obtaining information on listed species or their habitats or clarifying the consultation process. It may also assist the Federal agencies in confirming their analysis or judgment of beneficial or detrimental effects that could result from their planned action on listed species or their habitat. Such consultation is supplemental to and not a sub-

stitute for, the formal consultation process described in these guidelines.

B. Initiation of the Consultation and Assistance Process

1. Consultation should be requested by Federal agencies as early as possible during activity or program planning and evaluation of alternatives. Such consultation may disclose conflicts between the activity or program, or proposed alternatives, and listed species considerations. Such disclosure could prompt an early modification of the activity or program or dismissal of alternatives by the Federal agency resulting in a saving of time, manpower, and money which would otherwise be expended by further evaluation.

2. When a Federal agency, using the criteria presented in part III. A. of these guidelines, determines that consultation with the FWS or NMFS should be undertaken, it should forward its written request for consultation to the FWS or the NMFS Regional Director for the Region or high seas in which the activity or program will occur. For activities or programs involving foreign countries, consultation should be requested from the Director, FWS or NMFS. Where Federal funds are used in an activity or program but the action will be carried out by a non-Federal entity, the funding agency should initiate the consultation process.

3. The FWS or the NMFS may from time to time, become aware of a Federal agency

planning or conducting an activity or program that could affect listed species or their habitats that has not received the benefit of the consultation process. When this situation exists, the Regional Director or Director, FWS or NMFS, will promptly notify the Federal agency stating the nature of the action, and requesting that the consultation process be initiated.

C. Consultation and Assistance Process

1. While the burden is on the Federal agencies to collect information and conduct studies, take required actions to insure that their activities or programs will not jeopardize the continued existence of listed species or destroy or adversely modify their critical habitats, the FWS or the NMFS will, to the extent they are able, assist Federal agencies upon request by providing (1) such data and reports as they possess, (2) manpower and resources for the collection of necessary biological data and the conduct of required studies and (3) recommendations for necessary additional data, studies or surveys, suitable alternatives or methods for modification of the proposed action to insure compliance with section 7.

2. Consultation under the Act may be consolidated with other required consultation procedures such as the Fish and Wildlife Coordination Act, National Environmental Policy Act, or other agreed upon procedures. Satisfying the requirements of NEPA, the Fish and Wildlife Coordination Act, or other procedures or laws, may substantially satisfy the consultation process if satisfying such other laws includes

the consultation procedures set forth in these guidelines. Federal agencies should keep in mind, however, that satisfying the requirement of such other laws will not relieve them of the obligation to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of a listed species or modify or destroy critical habitat of a listed species.

3. Following the request for consultation from the Federal agency the Regional Director or Director of FWS or NMFS may arrange for a "threshhold examination" of the area in which the activity or program is proposed to be carried out. A threshhold examination may consist of an on-site inspection of the area and/or a review of available information to make a preliminary assessment as to whether listed species or their habitats will be impacted.
4. The FWS or the NMFS may seek, as appropriate, the assistance of the affected State or foreign country, the Federal agency, Universities, recovery teams, private conservation groups, et al., in conducting the threshhold examination.
5. If the Regional Director or Director is of the opinion, as a result of the threshhold examination of the activity or program, that in no likelihood, will (1) the continued existence of a listed species be jeopardized, (2) the area to be impacted by the activity or program be determined by further examination to be critical habitat, or (3) the activity or program results in the destruction or modification of habitat, previously

determined to be critical by the Secretary, through the Director, the Federal agency will be so notified in writing and further consultation will be unnecessary.

6. If the Regional Director or Director as a result of the threshhold examination is of the opinion that the activity or program may result in jeopardizing the continued existence of listed species or the destruction or adverse modification of previously determined critical habitat, he will so notify the Federal agency, in writing and a time frame in which the consultation process should be completed will be established in agreement with the Federal agency. The Federal agency with the assistance of the FWS or the NMFS, state, private, or other sources of expertise, as appropriate, shall then initiate appropriate surveys, studies, research and other means to obtain data and information relative to the impacts of the activity or program on listed species or their habitats. The data and information will be used by the Regional Director or Director in rendering his final biological opinions and, if requested, recommendations necessary to assist the Federal agency in meeting its obligation to insure that actions authorized, funded, or carried out by it do not jeopardize the continued existence of a listed species or modify or destroy critical habitat of a listed species.
7. If the Regional Director or Director as a result of the threshhold examination is of the opinion that the activity or program

will destroy or modify habitat that may be essential to the survival or recovery of listed species but which has not previously been determined to be critical, he shall so notify the Federal agency, in writing, and promptly initiate procedures described in II.A. and II.B. of the guidelines to determine if the area is critical habitat.

8. Cases may arise in the consultation and assistance process with the Regional Director that, in the opinion of the Regional Director, require the final biological opinion of the Director, FWS or NMFS. Should this become necessary, he will notify the Federal agency and forward all relevant correspondence and background material to the Director. The Director, after appropriate review and consultation with the Federal agency and other appropriate sources, will notify the agency of the final biological opinions and recommendations of the FWS or the NMFS.

D. Completion of the Consultation and Assistance Process

1. The consultation and assistance process clearly should be reflected in a written record from its inception to completion. Where the consultation requirements or procedures related to other laws or procedures, such as NEPA and the Fish and Wildlife Coordination Act, have been used to facilitate the consultation and assistance process described in these guidelines, information relating to affected listed species

and their habitats and the consultation process under these guidelines should be reflected clearly in the final documents required by these other laws (e.g., Environmental Impact Statement, environmental analyses, or assessments, Fish and Wildlife Report, etc.)

2. Consultation and assistance referred to in section 7 will have been completed when the Regional Director or Director, FWS or NMFS, has notified, in writing, the Federal agency, whose activity or program could impact listed species and/or its habitat, of the final biological opinions and, if requested by the Federal agency, recommendations of the FWS or NMFS. Such biological opinions and recommendations shall be accompanied by a statement of the reasons and biological evidence, including appropriate documentation, contributing, to his opinions and recommendations. Upon receipt of the biological opinions and recommendations of the FWS or the NMFS, it will be the prerogative and responsibility of the Federal agency to determine the final course of action that it will follow in light of its statutory requirements.
3. If, after completion of the consultation process, the initiating Federal agency (1) acquires new data revealing impacts to listed species or their habitats not previously considered, (2) substantially modifies its initial activity or program which could affect listed species or their habitats in a

manner not previously considered by that agency in the consultation process, or (3) a new species is listed that would be affected by the activity or program, the agency should redetermine the need for consultation with the FWS or NMFS.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

Office of the Administrator

Nov. 21, 1983

Ms. Nancy Sweeney
U.S. Fish and Wildlife Service
Office of Endangered Species
Suite 500
1000 N. Glebe Road
Arlington, Virginia 22205

Dear Ms. Sweeney:

In accordance with EPA's responsibilities under Section 309 of the Clean Air Act, we have reviewed the U.S. Fish and Wildlife and National Marine Fisheries Service proposed rule to implement Section 7 (Interagency Cooperation) of the Endangered Species Act of 1973, as amended. Our major concerns and recommendations are identified below. A section-by-section discussion of these concerns and recommendations are presented in the enclosed detailed analysis.

Our concerns with the proposed regulation focus on the scope, definition of terms, and threshhold of effects for determination of whether or not a formal agency consultation process must take place as the result of a prospective Federal action, or the prospective issuance of a permit or license by a Federal agency to a private permit or license applicant.

Specifically, the concerns identified in these areas include:

(1) the narrowing of the scope of applicability of Section 7 consultation to exclude Federal actions which occur outside the territorial jurisdiction of the United States; and all actions except those for which a Federal agency has made the determination to prepare an Environmental Impact Statement;

(2) the redefinition and hence reinterpretation, or newly proposed definitions, for the terms "action"; "biological assessment"; cumulative effects "destruction or adverse modification"; and "jeopardize the continued existence of..."

(3) the need to incorporate in the body of the regulation, the specific substantive and procedural criteria and requirements for preparation of a biological assessment;

(4) the apparent reduction as to restrictions on the irreversible or irretrievable commitment of resources for a proposed action prior to completion of a biological assessment; and

(5) the narrowing of the standard for interagency consultation to require adverse, or detrimental effect to be shown as a threshhold test for initiation of formal interagency consultation procedures.

Our concerns and specific recommendations for language revisions are discussed in the enclosed *Detailed Comments*. We offer our staff resources within EPA's Office of Federal Activities to contribute, to the maximum extent feasible, to the development of the final regulation. If you have any questions please contact me or Susan Sarason of our Office of Federal Activities staff at 382-5049.

Sincerely yours,

/s/ Josephine S. Cooper

JOSEPHINE S. COOPER
Assistant Administrator
for External Affairs

Enclosure

DETAILED COMMENTS
PART 402 – INTERAGENCY COOPERATION ENDANGERED SPECIES ACT OF 1973, AS AMENDED PROPOSED RULE

SUBPART A – GENERAL

Section 402.1 – Scope

This Section interprets and implements Section 7(a) through (d) of the Act, Interagency Cooperation. The current regulation includes, within the scope of activities or programs subject to interagency consultation, those federal activities and programs which would occur upon the high seas or in foreign countries. Such extraterritorial application of Section 7 is deleted from the proposed regulation which appears to apply only to actions which would occur within the territorial jurisdiction of the United States. We recommend that the language of the 1978 regulation be retained. Support for this recommendation is found in the language of the statute under the following sections: Section 7(a)(1) which directs that all federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of listed species and critical habitat. The listing of such species and habitat includes those found on the high seas or in foreign countries.

- Section 7(a)(2) which requires federal agencies to insure that *any* action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any listed species or critical habitat. Sections 7(a)(1) and (2) require protection and conservation of listed species and habitat that are found within the territorial limits of the United States, on the high seas or in foreign nations;

- Section 7(i) which prohibits the Endangered Species Committee from considering for exemption any application made to it if the Secretary of State, after a review of the proposed agency action and its potential implications, certifies that the granting of such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States;
- Section 7(n) which provides for judicial review of any decision of the Endangered Species Committee in the U.S. Court of Appeals for any Committee decision which is being, or will be, carried out outside the jurisdiction of U.S. circuit courts. The provision of judicial review over activities beyond the territorial jurisdiction of U.S. courts for decisions of the Endangered Species Committee anticipates that federal agency actions, subject to Section 7 consultation and exemption procedures will occur outside the territorial boundaries of the United States;
- Section 4 which requires the Secretary in making determinations as to whether any species is an endangered or a threatened species, to conduct a review of the status of the species after taking into account those efforts of a State or foreign nation to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas, in making these determinations, the Secretary must consider species which have been designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or foreign nation that is responsible for the conservation of fish or wildlife or plants;

- Section 2 which states that "...the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction...;" and that
  - "Encouraging the states and other interested parties, through federal financial assistance and a system of incentives, to develop and maintain conservation programs, which meet national and international standards is a key to meeting the nation's international commitments and to better safe-guarding, for the benefit of all citizens, the nation's heritage in fish, wildlife and plants."
  - "The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section;"
  - It is further declared to be the policy of Congress that all federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purpose of this Act.

Section 402.2 – Definitions

Our recommended revisions to the definition of terms as proposed in the 1983 regulation are indicated below by the bracekting of language to be deleted and the underlining of new recommended language.

- The language change we are proposing for this definition reflects our concerns regarding the application of Section 7 to extraterritorial activities. This recommended language also conforms more closely to the definition of "activities or program" in the currently operable 1978 regulation.

  "Action – means all [actions] *activities or programs* of any kind authorized, funded, or carried out, in whole or in part, by federal agencies *in the United States, upon the high seas, and in foreign countries*. Examples include, but are not limited to: (a) the promulgation of regulations; (b) the granting of licenses, contracts, leases, easements, right-of-way, permits, or grants-in-aid; or (c) actions directly or indirectly causing modifications to the land, water, or air."

- "Biological assessment" – The proposed definition would not require "each federal agency...with respect to *any agency action of such agency*"...to request of the Secretary the information prescribed in the 1982 amendments, nor prepare biological assessments with such information unless the action proposed is a major construction activity which is a major Federal action significantly affecting the quality of the human environment, for which the action agency has made the determination that an Environmental Impact Statement must be prepared. Consequently, the proposed regulation redefines the congressionally mandated definition of "biological assessment" and narrows its scope of applicability. It is our experience that the majority of federal construction activities and those permitted by federal agencies are not sub-

ject to the level of detail and documentation and analysis of the Environmental Impact Statement (EIS) process. For example, .5% of all Section 404 permits (Dredge and Fill permits issued under Section 404 of the Clean Water Act) are addressed in an EIS. The Department's proposed definition would exempt 99.5% of all Section 404 permits from interagency consultation and compliance with Section 7(a)(2) of the Endangered Species Act. Consequently, we recommend that the language of the regulation adopt, verbatim the definition of biological assessment defined under Section 7(c) of the Endangered Species Act.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS

vs.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANT

AFFIDAVIT OF JOHN M. FITZGERALD

District of Columbia) ss.

John Fitzgerald, being duly sworn, states:

1. I am a member of Defenders of Wildlife.

2. I am on Defenders staff and have been for over two years as Washington Representative for Endangered Wildlife Programs. As such, I work to ensure the strength of the Endangered Species Act and its implementation.

3. I am an attorney and a member in good standing of the District of Columbia Bar.

4. I have a personal and professional interest in the conservation and recovery of endangered and threatened species, proposed and candidate species, and other species likely to become endangered.

5. I have enjoyed and observed, in zoos and on film, endangered and threatened wildlife, including Asian elephants, leopards, and others that will be harmed by U.S. agency actions described herein and in other materials submitted by plaintiffs.

6. I will be harmed, in fact, by the harm to listed wildlife – by the reduction of their availability for viewing in zoos and films, by the elimination of the subjects of my professional work, by the irrevocable and irreparable harm to the web of life that sustains me in my profession and in life.

7. For example, endangered arctic and ˜american peregrine falcons and other endangered species and, in turn, Defenders members who enjoy them, are also harmed by the destruction of their wintering and migration stopover areas that results from projects such as the Polonoroeste Project. This includes construction of highway BR-364 and settlement and planned deforestation of the amazon rain forest funded by World and Inter-American Bank loans to Brazil. The World Bank has committed over $500 million dollars alone to this project. (Aufderheide and Rich, "Debacle in the Amazon", *Defenders*, March/April, 1985, 20-32.)

8. Endangered Species in the Amazon forest that are being harmed by these deforestation projects also include the jaguar, the harpy eagle, the maned wolf, and others from the existing list of endangered and threatened species in addition to hundreds or thousands of species that will be eliminated before they are put on the list at the current rate of listing which is abour 60 species per year. (Endangered Species list, 50 CFR 17.11; see, Peter H. Raven, "The Urgency of Tropical Conservation" *The Nature Conservancy News*, January-March 1986, 7-11; Per Ola and

Emily d'Aulaire, "Lessons From a Ravaged Jungle", *International Wildlife*, September-October, 1986, 34-40; Fitzgerald and Meese, *Saving Endangered Species*, Species Listing Analysis, at 11, July 1986. Copies attached).

9. Highway construction that is leading to the deforestation is also the result of direct U.S. agency funding through the Department of State and direct U.S. Army Corps of Engineers Assistance to the Brazilian Corps of Engineers. (World Wildlife Fund memorandum citing Nicolas Guppy, *Foreign Affairs*, 1984.)

10. The Three Gorges Dam project in China has been aided and will be aided by several U.S. Agencies, including but not limited to the "Three Gorges Working Group" members—Army Corps of Engineers and the Bureau of Reclamation, which is submitting designs and providing technical planning assistance for the massive project. (Asia-Pacific People's Environment Network, (newsletter) 21st June, 1986, *Water for the World*, Bureau of Reclamation, (attached).)

11. The Three Gorges Dam project is likely to harm and will undoubtedly affect (the standard for requiring consultation) the endangered Chinese alligator which inhabits the Yangtze River (6 *Grizmek's Animal Life Encyclopedia*, Reptiles, 128, Van Nostrand Reinhold Company, NY, NY.) It will also further endanger the Yangtze River Dolphin, which I understand is under consideration for listing by the National Marine Fisheries Service and already on Appendix I (most endangered) of the Convention on International Trade in Endangered Species of Fauna and Flora.

12. The on-going Mahaweli project funded and assisted by the Agency for International Development and the World Bank in Sri Lanka (See affidavit of Amy Skilbred) will harm many listed species.

13. In April of 1978, John Grandy, then with Defenders, wrote a letter (copy attached) to the Enrionmental Affairs Coordinator of the Agency for International Development concerning the Mahaweli project and the need for the required Section 7 consultation with the Department of the Interior regarding the project. At that time it seemed the AID would officially consult with Interior.

14. In a 1980 memorandum about the Mahaweli Project, the Chief of the Office of Endangered Species reported to the Associate Director of the Fish and Wildlife Service that "no less than eight Endangered and Threatened Species (Indian elephant, leopard, purple-faced languar, toque macaque, red face malkoha, Bengal monitor, muggar crocodile, and python) are found in the project area." The Director notes the fact that AID was "concerned about the continued existance of Endangered and Threatened Species in the area". He also notes that despite AID's refusal to request or submit to a consultation under Section 7 of the Endangered Species Act, AID did plan to take several steps over a period of as much as 10 years to mitigate damage to these and other species. The Director concluded by writing "Our willingness to be of assistance in Endangered species problems does not negate our belief that overseas projects conducted by United States agencies require Section 7 consultation if listed species may be affected." (copy attached).

15. Defenders has consistently supported and sought to strengthen the United States laws and programs protecting wildlife nationally and internationally, particularly the Endangered Species Act and programs authorized and duties required thereunder.

16. Defenders of Wildlife has actively worked for the conservation of foreign species through the U.S. Endangered Act. For example, Defenders has actively reviewed and submitted written comments on the proposed changes in the classification and/or regulations for listed foreign species such as the leopard and the kangaroo. Further, Defenders brought a lawsuit in 1981 challenging Department of the Interior regulations which repealed a 1974 import ban on the hides and meat of kangaroos threatened with extinction.

17. In further example, in 1985, the National Marine Fisheries Service (NMFS) listed the Gulf of California Harbor Porpoise as endangered in response to Defenders' 1978 petition. The Gulf of California harbor porpoise exists only in Mexican waters. Defenders has remained actively involved in the recovery process for the species by persuading Congress to provide funds for fiscal years 1986 and 87 through the Congressional appropriations process for NMFS to plan and conduct recovery efforts on behalf of the porpoise.

18. Defenders has sought to ensure funding to implement the Western Hemisphere Convention through the Congressional appropriations process as authorized in Section 8A(e) and Section 15(d) of the Endangered Species Act.

19. Defenders' staff attended both the negotiating convention held in Bonn, West Germany in 1979 and the first meeting of the parties held in Bonn in 1979 as approved official observers. Defenders played a leadership role in developing a coordinated, worldwide, nongovernmental organization, position paper on the draft CCMA text which was distributed to all the governmental delegations assembled to negotiate the treaty.

20. Defenders' staff has attended and participated in four of the five regular biennial Conferences of the Parties

to CITES as approved official observers. Defenders' unique expertise has often been solicited by governmental delegates at these meetings.

21. Defenders' representative served as a member of the U.S. delegation to the Special Working Group of the Parties to CITES in Geneva, Switzerland in 1977. Most recently, Defenders' representative attended the Technical Expert Committee meeting as an observer this year in Lausanne, Switzerland.

22. Defenders has long kept our members informed about and interested in international wildlife issues through publication of articles on wildlife overseas in numerous issues of *Defenders* magazine. A list of the articles in wildlife in foreign countries and international waters from 1980 through 1986 is attached. (See also ESA Report, Saving Endangered Species, attached, Consultation Section, pp. 22-23.)

23. In the early 1970's, then Defenders of Wildlife Board member Edward Steele launched a campaign to help solve Madagascar's ecological problems which threatened the island's endangered wildlife, particularly the many rare and endangered species of lemurs. In April, 1975, *Defenders* magazine devoted an entire issue to Madagascar's wildlife (copy attached). The first article in the issue was entitled, "Madagascar's Endangered Wildlife". It mentions Dr. Robert Sussman, an anthropologist who is also a lemurologist at Washington University. Dr. Sussman, a Defenders member and recent Board member, has been a leader in the conservation of this wildlife and its habitat and has recently received an award from its government. Any U.S. activity there which encourages the further deforestation of the island is likely to affect these endangered species to the detriment of Dr. Sussman and other Defenders members.

24. After the publication of "Dams" in *Defenders* May/June 86 issue, scores of Defenders members wrote the head of the World Bank protesting Bank funding of such multi-dam projects as the Narmada Valley Project now underway in India. It will include 30 major dams, 135 medium-sized dams and more than 3000 small dams over the next 50 years. The first phase alone will inundate 11% of the Narmada River basin's forests and with them much of the areas wildlife and its habitat. These include 35,000 acres of teak forest, traditionally harvested with the labor of asian elephants. ("Dams", attached and *Bankrolling Disasters*, International Development Banks and the Global Environment, Sierra Club, 1986, copy attached.)

25. Defenders' members include many who enjoy and study in Zoological Parks in the United States endangered and threatened wildlife from foreign countries, such as the asian elephant whose population will be diminished by A.I.D. and other agency actions in asia including Sri Lanka and Thailand as noted in the affidavits of Eliot McClure and Amy Skilbred. To the extent that these elephants and other species become less available for zoos in the U.S. due to their further endangerment overseas, these Defenders membes will be harmed. Captive breeding efforts for many of the species, and thus their conservation, will also be harmed.

26. There is a growing controversy over the lack of investigation, mitigation and conservation efforts undertaken by U.S. agencies concerning actions affecting endangered and threatened species and species which are likely to become so threatened and endangered in foreign countries.

27. The question of whether consultation is required, as finally presented in the final regulation of the Secretary concerning the consultation process under Section 7 of

the Act, is a specific and immediate example or a case in point of that controversy requiring resolution in order to avoid further harm as a result of the U.S. agency actions described in plaintiffs' submissions, among other U.S. actions.

28. The relief the plaintiffs have requested, including the requirement in regulations of the Interior Department that agencies consult with Interior concerning the effects of their actions on threatened and endangered species in foreign countries, will prevent or reduce harm to the very interests the Endangered Species Act was designed to protect, including the interests of Defenders and its members.

29. Defenders of Wildlife and its members will benefit from the reduction in harm and avoidance of jeopardy to and the opportunity for enhanced conservation and of the listed species that the requested consultation between agencies is intended to bring about.

/s/ John M. Fitzgerald
JOHN M. FITZGERALD

District of Columbia) ss.

Subscribed and sworn to before me
this 7th day of November, 1986

/s/ June M. Leartoan
Notary Public
My commission expires 10/14/91

United States Bureau of Reclamation, *Water for the World*[1]

[photograph omitted]

Caption: *"What do we want with this worthless area—this region of savages and wild beasts, of shifting sands and whirlwinds of dust, of cactus and prairie dogs? To what use could we ever hope to put these great deserts and these endless mountain ranges?"—U.S. Statesman Daniel Webster, 1852.*

Civilization began in the arid valleys of the Middle East. Simple irrigation systems brought water to the desert lands, changing them into productive fields and creating a stable agriculutural economy that would nourish the growth of the world's first cities. Irrigated agriculture is as old as history itself, and, time and time again, history has shown that water resources development is really human resources development.

Nowhere is this fact more evident than in the American West. Many early explorers labeled the land as useless, harsh, and uninhabitable, but a few saw the potential of this vast area. John Wesley Powell led the drive to open the West to settlement through the development of water resources. His efforts eventually resulted in the creation of the U.S. Bureau of Reclamation in 1902.

[1 This Bureau of Reclamation pamphlet is printed in French and Spanish as well as English, and contains a number of photographs. Only the English portions of the pamphlet are reprinted here. The photographs are omitted, but the captions are reprinted.]

Today, Reclamation has turned the "useless" lands of the American West into some of the world's most productive farmlands. Water from Reclamation projects supplies approximately 3 percent of the cropland in the United States, yet that land produces 10 percent of the Nation's crops. The towns, cities, and industries that grew up near irrigated lands depend on hydropower from Reclamation projects as a major source of electricity. Many of these same communities also rely on Reclamation projects for their potable water supply. Originally created to bring agricultural water to the arid lands of the western United States, Reclamation has grown and changed over its 80-year history to encompass the entire range of services that have made Reclamation synonymous with water resources development throughout the world.

[three photographs omitted]

Captions:

A basic irrigation system in Pakistan typifies the ongoing need to develop agriculture.

Reclamation irrigation systems, such as the Palo Verde Project in California, led to the growth and development of the American west.

Hoover Dam, a landmark Reclamation multipurpose project, provides water to millions of people for agricultural, municipal, and industrial use and for hydropower generation.

International Accomplishments

Although Reclamation built its reputation in the American West, some of its most outstanding projects lie outside the boundaries of the United States.

Over the years, administrators, engineers, and scientists from more than 115 nations have come to Reclamation for assistance in dealing with their water resources development problems. Reclamation's overseas planning activities have been extensive, with hundreds of volumes of reports produced. Some of the larger studies completed by Reclamation include:

Helmand Valley Development – Afghanistan
The Snowy Mountains Scheme – Australia
Rio Sao Francisco Basin – Brazil
Elqui Valley – Chile
Blue Nile River Basin – Ethiopia
Han River Basin – Korea
Lower Mekong River Basin – Thailand/Laos
Kuala Lumpur Flood Mitigation Project – Malaysia
Rio San Juan Project – Nicaragua/Costa Rica
Lake Chad Basin – Nigeria
Magat River Project – Philippines
Tsengwen Reservoir – Taiwan

The Lower Mekong River Basin Studies in Thailand and Laos illustrate the magnitude of some of these planning studies. Planning for the project took nine years, a resident staff of 35, and over 200 local employees. When the plan was completed, it resulted in a proposal for a dam the size of Grand Coulee with a reservoir that could irrigate 2 million hectares (4.9 million acres). Reclamation also has been involved recently in a number of planning and construction projects overseas.

[five photographs omitted]

Captions:

King Gates Dam is one of the three dams in the Kuala Lumpur Flood Mitigation Project for which Reclamation is providing technical assistance.

Reclamation served as an advisor in the development of the Helmand Valley in Afghanistan.

The governments of the United States and Israel joined in the development of new desalting technology which resulted in this prototype multi-stage flash plant.

A proposed site for Three Gorges Dam on the Yangtze River in the People's Republic of China. Reclamation is providing technical planning assistance for this massive project.

The proposed Three Gorges and Ertan projects could join the Great Wall as landmark civil engineering achievements in China.

Three Gorges Dam – People's Republic of China

One of the first overseas projects which Reclamation helped plan was the Three Gorges Dam, located on China's Yangtze River. By the standards of the day, the project would have been the largest irrigation and hydroelectric power project in the world. Three Gorges Dam would have been a third larger than Grand Coulee Dam and 8 meters (24 feet) taller than Hoover Dam. It would have had a generating capacity three times that of the Grand Coulee, Hoover, and Shasta Dam powerplants combined.

A combination of economic and political problems brought planning for the project to a halt in 1947. All of the records for the project were indexed and stored by Reclamation and the People's Republic of China. Even with the passage of more than three decades, the project would be one of the world's largest single water resources developments.

Provisions of Annex I and II of the Hydropower Protocol, signed in 1979, between the United States and the People's Republic of China effectively reopened the Three Gorges Project. The Hydropower Annex also outlines cooperative programs for technical advice, assistance, and training from Reclamation and U.S. industry on the Ertan Hydroelectric Power Project. The proposed dam and powerplant on the Yalong River will have an installed generating capacity of 3,000 megawatts.

Tank Irrigation Project – Sri Lanka

In stark contrast to the massive Three Gorges Project in China, the government of Sri Lanka, the World Bank, and Reclamation rehabilitated and modernized five small irrigation tank projects in the dry northern zone of Sri Lanka. These five projects serve 12,750 hectares (31,500 acres), but knowledge gained during this work will also be extended to other work on approximately 175 similar projects throughout this island nation, thus helping to stabilize Sri Lanka's entire agricultural economy.

Aswan High Dam – Egypt

Even before the powerplant at the Soviet-built Aswan High Dam along Egypt's Nile River was completed, cracks developed in the plant's turbine runners, resulting in constant operational problems and reduced electrical generation. In 1981, Egypt, the Agency for International Development, and Reclamation joined forces to remedy the problem. In 1982, the Egyptian government signed a contract with an American firm for replacement of the runners and requested that Reclamation serve as its engineering advisor for the nine-year rehabilitation project. The rehabilitated Aswan Dam will then begin a new era of reliable service.

Concurrently, other Bureau of Reclamation representatives are working closely with the Egyptian Ministry of Irrigation in the development of that country's Master Water Plan and in the analysis of existing and planned multi-purpose projects. When completed, the Master Water Plan will serve as a comprehensive guide for developing and managing Egypt's water resources.

Municipal and Industrial Water Development – Saudi Arabia

Reclamation, the U.S. Department of the Treasury, and the government of Saudi Arabia are working together to improve the municipal and industrial water supply of the capital city of Riyadh. Reclamation is providing technical management advice, including reviews of the designs and specifications for a wide variety of projects. Reclamation is also providing additional advice on the construction of a reverse osmosis desalting plant, the development of deep wells, and the expansion of distribution systems designed to provide the growing city with more water.

At the same time, Reclamation is providing program planning for a desalination research and training center in Saudi Arabia. Work at the center will focus on improving the economics of desalination through the development of new techniques, materials, operation and maintenance procedures, and power conservation measures.

[two photographs omitted]

Captions:

Reclamation is advising the Egyptian government in the rehabilitation of the Aswan High Dam powerplant with American-made turbines.

The government of Saudi Arabia is promoting the development, of its water supplies for municipal, industrial, and agricultural purposes with Reclamation assistance.

[three captionless photographs omitted]

Cooperative Science and Technology Program – Spain

Reclamation and Spain, another country with a long history of irrigated agriculture, have joined in an interagency agreement with the Department of State to develop programs to perfect and improve the existing water projects in both the United States and Spain. Six studies designed to improve irrigation efficiency are being monitored by Reclamation in locations throughout Spain. Irrigation management, system automation, and irrigation technology programs are introducing drip and sprinkler irrigation systems, while research in areas such as flood forecasting and weather modification continues as part of a long-term effort to help Spain make better use of its water resources.

Inga-Shaba Transmission Line – Zaire

The world's longest and most powerful electrical transmission line now cuts across Africa's heartland. Reclamation served as technical advisor to the government of Zaire during the more than eight years required to design, build, and initiate operation of the project. Funded by the Export-Import Bank and built by a U.S.-led consortium, the 500-kilovolt direct current transmission line carries power from Inga Dam in the Congo River Basin to the mineral-rich Shaba region of Zaire, a distance of 1,700 kilometers (1,060 miles.)

During the line's construction, Reclamation also trained local workers in operation and maintenance procedures and related management practices.

Small and Medium-Sized Irrigation Projects – Peru

At the request of the Peruvian Ministry of Agriculture and Food, Reclamation completed a detailed technical feasibility review of eight projects scattered throughout Peru. These projects ranged from the rehabilitation and betterment of existing dams and canals to the opening of new irrigated lands. Because of the variety of projects and the diverse geography and economic conditions of the country, a new set of cost benefit analyses had to be prepared and applied.

Working with their Peruvian counterparts, a Reclamation review team prepared guidelines relating to specific needs and conditions in that country. Training in economics, hydrology, soil science, and construction engineering was also given by team members while the project review was under way.

[four photographs omitted]

Captions:

A medium-sized irrigation project near Aycaca, Peru.

The main power station on the Inga River in Zaire provides power for the copper mines 1,700 kilometers away.

Planning advisory assistance for hydroelectric development is another of the services which Reclamation offers.

Reclamation has developed decades of expertise in reservoir design and operation, key aspects of any water supply system.

A Full Spectrum of Services

The Bureau of Reclamation stands prepared to aid friendly nations in every stage of water resources development, from planning new projects to rebuilding existing projects. Among the services Reclamation can offer are:

Multi-purpose development planning for irrigation water, hydroelectric power, municipal and industrial water supplies, flood control, and recreation

Technical advisory assistance and construction supervision for dams, reservoirs, canals, irrigation distribution systems, municipal water systems, powerplants, and transmission lines

Economic analysis

Hydroelectric investigations

Soil classification

Sedimentation control

Dam safety reviews

Salinity control

Desalting research and development

Wind energy systems

Environmental planning

Weather modification

Applied research

[one photograph omitted]

Caption:

Reclamation specializes in the planning, design, construction, and operation and maintenance of irrigation projects in arid and semi-arid climates.

Training Programs

In addition to developing water resources projects throughout the world, the Bureau of Reclamation is also dedicated to developing the human resources required to effectively plan, design, build, operate, and maintain water resources projects. Long-term and short-term programs offered by Reclamation provide technical experience and education for engineers and administrators in every phase of water resources development, use, and management.

Headquartered at Reclamation's Engineering and Research Center in Denver, Colorado, the training program offers participants individually tailored instruction under the direction of the center's staff of engineers, economics, geologists, hydrologists, and agronomists. Participants in the training program can learn the skills required to build and manage water projects through direct field experience at Reclamation projects located throughout the western United States.

To augment the Bureau's long-term training program, one- and two-week seminars on specific water development and management areas are presented periodically. These seminars offer the most current information available in the fields of engineering, planning, operation and maintenance, and safety. Other special short-term visits and tours of Reclamation projects and the Engineering and Research Center can also be arranged.

Financing

Reclamation's overseas activities and training programs are carried out on a fully reimbursable basis.

Interested countries must arrange their own financing through the U.S. Agency for International Development or through international lending institu-

tions such as the World Bank, the Export-Import Bank, and the Inter-American Development Bank.

For detailed information on the procedures for receiving technical assistance from the Bureau of Reclamation, contact:

Office of Foreign Activities (Code 2000)
Bureau of Reclamation
U.S. Department of the Interior
18th and C Streets NW
Washington, D.C. 20240
U.S.A.

[two photographs omitted]

Captions:

Reclamation engineers work with their local counterparts to provide on-site training.

Technical training through individually tailored programs is offered at Reclamation's Engineering and Research Center in Denver, Colorado.

As the Nation's principal conservation agency, the Department of the Interior has responsibility for most of our nationally owned public lands and natural resources.

This includes fostering the wisest use of our land and water resources, protecting our fish and wildlife, preserving the environmental and cultural values of our national parks and historical places, and providing for the enjoyment of life through outdoor recreation.

The Department assesses our energy and mineral resources and works to assure that their development is in the best interests of all our people.

The Department also has a major responsibility for American Indian reservation communities and for people who live in Island Territories under U.S. administration.

DEFENDERS OF WILDLIFE

April 25, 1978

Mr. Albert C. Printz, Jr.
Environmental Affairs Coordinator
Agency for International Development
Washington, D.C. 20523

Dear Mr. Printz:

This letter is in response to your request for our views on the relationship between the ongoing or prospective activities of the Agency for International Development and the requirements of the Endangered Species Act. Specifically, these comments will cover the current situation with respect to elephants in Sri Lanka, and provide recommendations on how conflicts with endangered or threatened species can be avoided in the future.

Review of Law

The Endangered Species Act of 1973 provides guidance for all federal activities concerning threatened or endangered animals and plants or their habitats.

The intent of the Act is not only to provide for preservation of endangered and threatened species but, more importantly, to insure restoration of populations (16 U.S.C. 1532(11)) of endangered and/or threatened species to non-endangered-non-threatened levels. This is made clear in the definition of "conserve" (16 U.S.C. 1532(2)) and other appropriate parts of the Act. That this definition and its directions for restoration apply to the activities of the Agency for International Development and other agencies working at the international level is clear from other parts of the Act, notably 16 U.S.C. 1531(b) and 16 U.S.C. 1536.

The latter section, often referred to as Section 7 of the Act, provides, then, a dual mandate. Not only does it establish a "do not jeopardize" standard for relevant agency actions, but it also requires that each federal agency utilize its authority to carry out programs for the conservation (restoration) of endangered and threatened species.

Defenders of Wildlife, the World Wildlife Fund, and other conservation organizations strongly support this and other portions of the Endangered Species Act.

Endangered or Threatened Species in Sri Lanka

The case of the endangered Indian elephant in Sri Lanka provides a specific example against which to interpret this law and formulate overall policies for the future.

Indian elephants exist both in Sri Lanka and other regions of the Far East. However, the population of Indian elephants existing on Sri Lanka is a "species" within the meaning of the term (16 U.S.C. 1532(11)) in the Endangered Species Act. Thus, for legal purposes, the population of the Indian elephant on Sri Lanka is endangered in its own right and must be restored regardless of the status of Indian elephants in some other part of the world.

This does not mean that the contemplated development projects for Sri Lanka cannot necessarily be conducted. However, it does mean that certain procedures must be followed:

1. A.I.D. must critically evaluate the projects in light of the above-mentioned requirements of the Endangered Species Act. With respect to the effects on the Indian elephant, experts like Dr. Eisenberg must be consulted. In addition, the Department of the Interior must be consulted as prescribed in Section 7.*

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* We are pleased by reports that these consultations have already been initiated by A.I.D.

In any event, it is clear that A.I.D. must bear the burden of showing that the projects, if allowed to go forward, will be in compliance with the relevant provisions of the Endangered Species Act.

2. If the projects are found to be permissible under the Act, A.I.D. should use its authority to insure that its efforts in Sri Lanka lead to "conservation" (restoration) of Indian elephants and other resident endangered species. Such action would most assuredly involve having as a necessary part of the projects certain substantial actions such as agreed and enforceable land use controls or designation and purchase of wildlife refuges or parks where the elephants and other endangered species would receive protection in perpetuity. A.I.D. would certainly need to bring these opportunities to the attention of Sri Lanka, and would be able to use authority for these programs contained in the Endangered Species Act and Section 118 of the Foreign Assistance Act, as amended.

Guidelines for the Future

In our view, the above recommendations, when generalized, constitute a necessary and probably sufficient model for future operations of A.I.D. that involve threatened or endangered species. As a general operational plan, A.I.D. should:

1. Evaluate each potential project in relation to naturally occurring populations of wildlife. If endangered or threatened species are present in the proposed project area, A.I.D. has an affirmative burden of showing that the project will not violate the relevant portions of the Endangered Species Act of 1973 before allowing the project to be initiated.

2. Proposed projects should be evaulated in relation to their potential effect on rare, depleted, or localized endemic wildlife populations in the proposed project area. This would be necessary in order to insure that such "species" would not become endangered or threatened due to conditions associated with or caused by carrying out a proposed project.
3. In the event that projects are approved in areas in which endangered, threatened, rare, depleted, or localized endemic wildlife populations are present, A.I.D. should work cooperatively with foreign governments and utilize its existing authority to insure the establishment of parks, wildlife refuges, and/or suitable land-use controls so as to insure preservation and restoration, as appropriate, of such species. Establishing such parks, wildlife refuges, or enforceable land-use controls must be considered a necessary part of a proposed project, without which the project could not be allowed to go forward.

We suggest that the recommendations we have outlined above should be promulgated as standards by which to evaluate projects as soon as possible. These standards will present an opportunity for A.I.D. to participate in a meaningful way in preserving the cultural and wildlife heritage of developing nations. As such, the regulations will hopefully help other nations to preserve natural ecosystems and associated values, while permitting necessary and compatible economic development.

We are pleased that A.I.D. has taken the initiative to properly implement the provisions of the Endangered Species Act of 1973. We also commend you for having

assembled the group of knowledgeable conservation leaders to advise on the necessary steps to assure compliance with the law. And we suggest that an additional meeting of the working group be called promptly to discuss implementing the suggestions made in this letter.

Sincerely yours,

/s/ Thomas E. Lovejoy

THOMAS E. LOVEJOY
World Wildlife Fund

/s/ John W. Grandy

JOHN W. GRANDY
Defenders of Wildlife

cc: Don King
Cameron Saunders
Keith Schreiner
Larry Mason
Foster Knight
Lee Talbot
Eldon Greenberg
William Ackerman
Paul Weatherly
John Eisenberg
Other interested parties

April 7, 1980

Memorandum

To: Associate Director – Federal Assistance

From: Chief, Office of Endangered Species

Subject: Accelerated Mahaweli Project (AMP)/United States Agency for International Development (AID) Program to Develop the Water Resources of Sri Lanka

AID is participating, together with the World Bank, Canada, and European donors, with the government of Sri Lanka to develop the water resources of Sri Lanka's major river, the Mahaweli Ganga. This project (actually 12 projects together – see map A) will be funded at 2.3 billion dollars over the next 10 to 30 years. It will bring approximately 117,000 hectares (1 hectare equals 2.43 acres) of sparsely settled land under irrigated agricultural production and will result in the resettlement of more than 450,000 people.

AID is assisting the government of Sri Lanka in financing the design, construction, and supervision of the main and major branch canals in System B (see Map B) of the AMP. System B will irrigate 50,000 hectares of land and provide for the settlement of 40,000 farm families (about 224,000 people).

No less than eight Endangered and Threatened Species (Indian elephant, leopard, purple-faced languar, toque macaque, red face malkoha, Bengal monitor, mugger crocodile, and python) are found in the project area. The Sri Lankan government has requested the assistance of AID in mitigating the negative impacts to the wildlife involved. This calls for relocation of wildlife and the establishment of national parks.

AID, in a memorandum to you dated February 1, 1980, reiterated their belief that Section 7 of the Endangered Species Act does not apply to United States Agency actions in foreign countries. The memo goes on to state "never-the-less, AID is concerned about the continued existence of Endangered and Threatened Species and intends to conduct its operations with due regard for such species. Since the Fish and Wildlife Service (FWS) has the greatest amount of expertise within the United States Government regarding such species, AID would appreciate having an opportunity to discuss with FWS planning for the detailed design of the project." On January 29, 1980, representatives of the FWS; you, David Wesley and Richard Mitchell and Byron Swift of the Interior's Solicitors Office met with AID to discuss our possible involvement with the AMP. The FWS was asked for recommendations on how to minimize the negative impacts on Endangered and Threatened Species found within System B.

After consulting with a number of experts, including Walter Auffenberg and Wayne King, Florida State Museum, Gainesville, Florida; John Eisenberg and John Seidensticker, National Zoological Park, Washington, D.C.; Howard "Duke" Campbell, National Fish and Wildlife Laboratory, Gainesville, Florida; F.R. Fosberg, Smithsonian Institution, Washington, D.C.; Staff members of Branch of Management Operations and Branch of Biological Support/OES, it was decided to hold a second meeting with AID.

On February 28, 1980, representatives from the Branch of Management Operations, OES (Jack Edmundson, Richard Mitchell, Len West, and Stephen Tonjes) met with AID/Asia staff (Mike Demetre and Jane Stanley) to discuss the impacts that the Accelerated Mahaweli Project will have on Endangered and Threatened species in Sri Lanka.

The final Environmental Assessment of the Mahaweli Basin Development Phase I (including Maduru OYA-System B design) by TAMS of New York should be completed by the end of June. AID plans to let the contract for the design and supervision of the canal system by August. Mr. DeMetre's office has been asked to prepare a Wildlife Project report which is due by April. His office wishes the assistance of the FWS in preparing recommendations for the management of the wildlife found in the area.

AID will provide monetary assistance to the Sri Lanka Wildlife Department and has appropriated 400,000 dollars in FY81 for assisting, training and equipping the staff of the Wildlife Department. Up to 1 million dollars is committed for wildlife management with the possibility of 8 million dollars over a long-term period (5-10 years).

AID will produce a Project Identification Document (PID) by mid-summer and has asked for our technical opinions. They wish to have a long-term advisory relationship with the FWS. The OES team answered questions on the possibility of translocating herps (snakes, monitors, crocs), fisheries problems with the damming of the river and what the long-term problems of deforestation/development has on wildlife. AID wishes to continue to discuss the project with our office.

AID has made it clear that their request for assistance is not a request for Consultation under Section 7 of the Endangered Species Act. We are eager to provide the assistance requested and to open up avenues to provide assistance on other projects. We feel this is an important step in the conservation of listed species. Therefore OES will make recommendations to AID as to ways to minimize or eliminate the negative impacts to Endangered and Threatened species. Our willingness to be of assistance in Endangered species problems does not negate our belief that overseas projects conducted by United States agencies require Section 7 consultation if listed species may be affected.

John L. Spinks, Jr.

DAMS: They are destroying habitat and wildlife along many of the world's rivers

by Edward Goldsmith and Nicholas Hildyard
[from *Defenders*, May/June 1986]

Since the beginning of the historical era, man has been building dams. The ancient civilizations of Sumeria, Babylonia, Egypt, Ceylon and Cambodia, for example, were all justifiably famed for their irrigation works. Indeed, the embankments and tanks that remain at such ancient capitals as Anuradhapura in Sri Lanka and Angkor Wat in Cambodia still survive to bear proud witness to the engineering skills of those who constructed them. Today, however, advances in concrete technology and the development of vast earth-moving machines (the largest weighing 2,000 tons) have enabled us to build dams of a size and complexity that would have staggered the ancients.

The statistics speak for themselves. In Egypt, the Aswan High Dam is 17 times heavier than the great pyramid of Cheops. In Ghana, the Volta Dam is large enough to impound a reservoir covering 8,500 square kilometers – five percent of the total area of the country and an area almost the size of Lebanon. In Brazil, plans to harness the power of the Amazon and its tributaries with a complex of dams capable of providing 66,000 megawatts of electricity will entail flooding an area the size of Montana.

Still more ambitious is the proposed Sanxia or Three Gorges Dam on China's Yangtze River. This huge dam, the biggest yet, is projected to cost between $10 billion and $20 billion, flood a vast expanse of agricultural land displace between a million and 3 million people.

With funding now available from such institutions as the World Bank and the various international aid agencies, the pace of dam construction has accelerated dramatically since the Second World War. Significantly,

[photograph omitted]

Caption: *India's Sardar Sarovar Dam under construction on the Narmada River. On an earthquake fault, it required a 95-foot-deep concrete foundation.*

the very first loan ever made by the World Bank to a developing country – to Chile in March, 1948 – was for an irrigation and hydropower scheme. By June, 1982, the bank had lent $26.7 billion for agricultural projects, of which $10 billion went to financing no fewer than 285 irrigation projects. About 38 percent of the money advanced by the bank for agricultural development schemes has been for irrigation projects – and 90 percent of that lending has occurred during the last ten years.

The worldwide total of dams more than 150 meters high is expected to reach 113 by 1990; of these, 49 will have been built during the 1980s. In the Philippines alone, an estimated 861 dams are in the offing. Thirty-nine are already in operation, 12 are under construction, and 177 are awaiting construction. A further 31 are being studied, and more than 361 have been identified for study. Feasibility studies have been completed on 12 and tentative planning studies are under way on another 229.

Even more impressive than the dams themselves are the vast reservoirs whose waters they serve to impound. In 1970, there were at least 260 man-made reservoirs with a surface area of 100 to 1,000 square kilometers, and 40 with a surface area of more than 1,000 square kilometers. The volume of water stored in those reservoirs – some 4,000 cubic kilometers – has been estimated to be "approxi-

mately equal to one-third of the water of the earth's atmosphere." Small wonder, perhaps, that the reservoirs behind today's "superdams" are said to be the only man-made structures on this planet that are clearly visible from space.

For the future, even more ambitious schemes are planned, many of which involve the diversion of whole rivers, the transfer of water from one river basin to another and, even, the reversal of the flow of rivers.

In the Soviet Union, plans are afoot to build the Siberian Diversion Scheme, which involves blocking the flow of the River Ob and pumping its water via a canal through Kazakhstan in order to irrigate land 1,500 kilometers away. The water will eventually be flushed into the Aral Sea, where the water level is already sinking due to the demands of industry and irrigation, and the salinity is seriously increasing. The initial investment is expected to be at least $41.6 billion. Closer to the capital, there are plans to dam the Pecara River to the northeast of Moscow in order to transfer water to a southern tributary of the Volga.

In China, a canal is to be built to divert water from the Chang Jiang (Yangtze) River to agricultural areas in the arid north of China. Three possible routes have been proposed: a western route, a middle route and an eastern route. The western route has never been properly surveyed; the eastern route was surveyed in detail in 1978 and the middle route in 1979. At the time of writing, the middle route appears to be favored. It will require the construction of a 1,265-kilometer canal to Beijing, which will cross the Huang He River just west of Zhengzhou and then pass through the Nanyang Basin in Southern Henan. The scheme is expected to irrigate 3.8 million hectares of farmland and to guarantee regular water supplies to a further 1.3 million hectares. Almost 7.4 cubic kilometers of

water will be provided for industrial, mining, municipal and domestic uses. Giant pumping stations are also to be built to drain excess water from an area of 18,000 square kilometers at a rate of 5,000 cubic meters a second.

EQUIVALENTS OF SOME METRIC MEASUREMENTS USED IN DAM BUILDING

LENGTH

kilometer = 0.621 mile
meter = 39.370 inches

AREA

square kilometer = 0.386 square mile
hectare = 2.471 acres

VOLUME

Cubic kilometer = 0.239 cubic miles
cubic meter = 35.314 cubic feet

In India, a series of canals is being built to divert water from the Brahmaputra, Ganges and Indus Rivers to the drought-prone regions of Madhya Pradesh in central India, Rajasthan in the west and Tamil Nadu in the south. Those canals will "radiate" out from the 2,000-mile Ganges/Cauvery River Canal, which will run down almost the entire length of the country.

In the United States, similar schemes include the Texas Water System and the NAWAPA Project. The latter (the North American Water and Power Alliance—hence its acronym) would channel water from Alaska and Canada in order to irrigate Mexico and the southwestern United States, at a cost of some $2 trillion. An area of 1.3 million square miles would have to be drained; 177 lakes and

reservoirs would need to be built: and the scheme would require the cooperation of three nations, 36 states, 11 provinces and thousands of cities.

The Texas Water System, as originally conceived in 1968, involved transferring water from the humid eastern region of Texas to the arid and semiarid western region of the state—in addition to "importing" massive amounts of water from the Mississippi Basin via the state of Louisiana. "The key to the Texas Water System," writes Charles Greer of Indiana University, "is a series of reservoirs on the major rivers of east and central Texas, which drain into the Gulf of Mexico. Ultimately the system of reservoirs, large and small, would be more than 200 in number. The role of these reservoirs in the Texas Water System would be to store water, from the rivers of East Texas as well as from out-of-state imports, prior to conveyance through two major canal systems: the Coastal

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[photograph omitted]

Caption: *Workers bag leaves for cigarette wrappings at India's Tawa River Dam, part of the Narmada Valley complex.*

Canal System and the Trans-Texas Canal System." Together, these two canals make up the Texas Water System. The coastal canal "would extend approximately 600 kilometers southwęstward, flowing by gravity from the Sabine River on the eastern edge of Texas to the southern tip of the state." As for the Trans-Texas Canal, it would extend "about 1,200 kilometers westward from the Upper Sulphur River basin in northeast Texas." Although

the original plan was turned down by a local referendum in 1969, a revised version (no less ambitious) has been proposed.

There is little doubt that at least some of those involved in building the massive "water development" projects described above sincerely believe that they are improving the lot of mankind. In 1975, the former commissioner of the U.S. Bureau of Reclamation, Gilbert G. Stamm, told a congressional committee: "Water resource projects have many positive environmental effects. When water management practices regulate and augment low flows of rivers and streams, decrease erosion, prevent floods, eliminate waste of water and in many instances change deserts into gardens where man can comfortably live and prosper, the result is betterment of environmental conditions."

In a similar vein, the U.S. Army Corps of Engineers assured the American public in a 1977 publication that by building dams, it aimed "to preserve the unique and important ecological, aesthetic and cultural values of our national heritage; to conserve and use wisely the natural resources of our nation for the benefit of present and future generations; to restore, maintain and enhance the natural and man-made environment in terms of productivity, variety, spaciousness, beauty and other measures of quality . . . and to create new opportunities for the American people to enjoy the environment and the use of natural resources."

Indeed, reading the official literature on large-scale dams and other water development projects—that is to say, the literature put out by the dam-building industry—one might be forgiven for thinking that such projects can bring nothing but good for mankind. Little mention is made of their social, let alone their ecological, impact. (A 1982 report by the International Commission on

Large Dams, for instance, makes only one reference to the likelihood of irrigation schemes' causing salinization, a problem which is putting hundreds of thousands of acres out of production every year.) Instead, we are presented with a long and growing list of the benefits to be accrued from developing the rivers of the world, benefits ranging from ensuring supplies of potable water (a critical condition for the majority of the Third World countries, where unhygienic water supplies are a major cause of disease) to creating jobs and controlling floods.

Title: The inevitable loss of wildlife due to the flooding of forests, agricultural land and brush is rarely cited as a reason for preventing the building of a dam. At times the indifference shown by officials is astounding.

[8 photographs omitted]

Caption: *Far left: A Yangtze tributary, the Huangbo River, now is backed up by the Gezhouba Dam, a regulating dam for the giant Three Gorges project. The view is from a cave used as a retreat by poets and mystics during the Tang Dynasty, 618 to 907 A.D. Habitat of the Malaysian flying lemur and the green peafowl of Thailand, both rare species, is theatened by dam proposals. Pages 22-23: Work on a coffer dam for the Gezhouba Dam suggests the vastness of the change planned for the Yangtze basin. Built of steel plates and piles, the coffer dam temporarily will hold back the river while concrete is poured for the main dam. Photo by Baruch Boxer.*

Other than birds, and possibly a few alert mammals, how many animals really stand a chance of 'relocating' themselves when the waters come their way? How much adjoining forest is there for them to move into?

[photographs omitted]

Caption: *Dam-building on Sri Lanka's Mahaweli River, aided by the World Bank, will adversely affect habitat of such species as the estuarine crocodile and the endangered Indian python.*

But, most important of all, dams and other water projects are seen as having a vital role to play in ensuring future economic development. By supplying hydroelectricity, dams supply "the power to progress." And by providing water for irrigation, they will help boost food production – and thus, it is argued, enable more people to be fed. These are the two *major* benefits claimed for large-scale water development projects. Given that food and energy are the two commodities in shortest supply throughout the Third World, is it any wonder that so many developing countries now see large-scale dams as the touchstone of future prosperity? In a world where millions go to bed hungry and where few have access to even the cheapest material goods that we take for granted in the West, a demand that the further building of large-scale dams should cease forthwith must sound churlish. Would not doing so effectively condemn still more people to death by starvation? And if the experts insist that dams provide the route to material prosperity for impoverished millions, who are we to gainsay them?

But there is another aspect to the dam-building issue, one that the industry is less than keen to display. It includes massive ecological destruction, social misery, and increasing ill-health and impoverishment for those very people who are expected to benefit most. Little of the extra food grown through irrigation schemes ever reaches

those who need it most. In the long run, those irrigation schemes are turning vast areas of fertile land into salt-encrusted deserts, and the industry powered by dams is further undermining food supplies through pollution and the destruction of agricultural land. Millions of people have been uprooted from their homes to make way for the reservoirs of large dams; their social lives have been shattered and their cultures destroyed; and their health has been jeopardized by the water-borne diseases introduced by those reservoirs and their associated irrigation works. Dams are now suspected of triggering earthquakes, have failed to control floods and have actually served to increase the severity of flood damage. In many instances they have reduced the quality of drinking water for hundreds of millions of people. The real beneficiaries of large-scale dams and water development schemes have invariably been large multinational companies, the urban elites of the Third World and the politicians who commissioned the projects in the first place.

When a dam is closed, the waters of its reservoir begin to rise, submerging vast areas of land. Often the area flooded contains thousands of acres of good agricultural land. In Sri Lanka, for example, the Victoria Dam (part of the giant Mahaweli Project) will, according to L. Alexis, "destroy 3,000 acres of land cultivated with paddy, tobacco, vegetables and other food crops; 2,000 acres cultivated with mixed fruit, cocoa, coffee, coconut, spices, tubers and soft wood in village gardens and homesteads; and 2,000 acres in big and small estates of cocoa, coffee, pepper, rubber, coconut, sugar cane and soft wood."

Figures are not available for the total worldwide loss of farmland to dam projects, but the number of people who have had to be resettled as a result suggests the productivity of the lands they previously occupied which have now been flooded. In India, for example, the Srisailam

Hydroelectric Scheme near Hyderabad flooded some 107,000 acres of farmland, land which, until the dam was closed, had provided a livelihood for some 100,000 people. Discussing that loss of agricultural land, the Fact-Finding Committee on Srisailam Project Evaluations notes: "The agricultural economy of the region was considered to be highly prosperous. The lands, both dry and wet, situated along the Tungabhadra and Krishna rivers were highly fertile and the cropping patterns adopted by the farmers were both remunerative and profitable. Not only food crops such as paddy, wheat and redgram, but also commercial crops such as groundnut, tobacco, chillies and cotton were grown extensively in the areas which have been submerged. The level of food production in these areas was quite high as the soil and the climate were very favorable to agriculture. Thus, the submersion of 107,000 acres caused an enormous amount of loss and hardship to the local villagers."

In addition to causing the loss of agricultural land, dams have also caused the drowning of thousands of acres of forest. It is estimated, for example, that between 1950 and 1975, India lost 479,000 hectares (1.2 million acres) of forest land to various river valley projects.

For the promoters of large-scale dams, the loss of forests is generally seen only in economic terms—that is, in terms of the actual market value of the timber submerged. "Officials totally ignore the *intangible* ecological value of such benefits as soil preservation, water replenishment, climatic stabilization, air purification or wildlife shelter," comment the authors of a recent report on India's grant Narmada Valley Project. This scheme involves the building of 30 major dams and will itself drown some 150,000 acres of forest, including 35,000 acres of teak forest. Indeed, the report goes on to note, if the intangible benefits provided by trees were taken into account, then—

in the estimation of India's prestigious Forest Research Institute – every tree should be valued at an economic worth of 100,000 rupees per 50 years of life.

We are also reminded that forests provide benefits that cannot be given an economic value. "Even if the intangible ecological benefits are quantifiable, the social value of forests is not. Yet, for the [indigenous tribal groups] the forest is of great cultural and psychological importance, and its destruction represents a serious disruptive event. Moreover there is no way of calculating the loss of the economic and genetic potential of a forest, for there may be dozens of hundreds of species which have not been . . . even identified."

The inevitable loss of wildlife due to the flooding of forests, agricultual land and bush is rarely cited as a reason for preventing the building of a dam. Indeed, at times the indifference shown by officials to the fate of those natural species that will be drowned by a dam's reservoir is astounding. We quote again from the report cited above on India's Narmada Valley Project: "Characteristically, there is no plan to relocate the wildlife [in the threatened area]. When we asked officials about this, they stated there would be 'natural relocation' – that is to say, the animals would move out of the area to be flooded by themselves. Such an assumption, however, seems to us to be more of a sick joke and a convenient excuse than a serious proposition. Other than birds, and possibly a few alert mammals, how many animals really stand a chance of 'relocating' themselves when the waters come their way? How much adjoining forest is there, anyway, for them to move into? Will not such a movement increase competition between animals (especially the strongly territorial ones) in the new habitat? And, if one includes wild flora in the category 'wildlife,' how on earth

are all the plants going to 'naturally relocate' themselves? Or, for that matter, the microorganisms?

[three photographs omitted]

Captions:

The Mahaweli project will destroy a migration route and vital feeding grounds of imperiled Asian elephants.

Gaur herds inhabiting southern India's Silent Valley were spared destruction of their habitat when plans for damming the valley were scrapped in the face of public opposition. Malaysian conservationists also were successful in stopping a Tembeling River dam that would have flooded Taman Nagara National Park, forest home of Malayan tapirs like this mother and her young.

"Incredibly enough, for some government departments 'wildlife' seems to mean only tigers and deer and other big mammals. In answer to a query from the Department of the Environment, the Government of Gujarat says, 'At present, there is no wildlife in the reservoir area of the proposed Sardar Sarovar Dam and its vicinity.' The sick joke continues. To the very next question, the reply is: 'After construction of the dam and the creation of the reservoir, it will be possible to develop a wildlife sanctuary or safari park in the vicinity.' Where, pray, is all the wildlife suddenly going to come from? When it comes to costs, there seem to be none; when it comes to benefits, there are suddenly a lot. And, when asked to specify rare and endangered species, as well as fish and crocodile breeding grounds, in the submergence zone, the Gujarat Government has kept silent. Why?"

At a time when experts warn that 20 percent of the world's animals and plants could be extinct by the end of the century as a result of poaching and illegal trading *alone*, the indifference of Third World and industrialized governments alike to the fate of their wildlife is alarming. Underlying that indifference is the widely held view that "conservation" is somehow the concern only of the rich and the indulgent.

To those committed to the idea that industrial development offers the panacea for such ills as poverty and malnutrition, the very thought that the interests of wildlife should take precedence over the requirements of development is inconceivable. Small wonder, then, that proponents of India's controversial Silent Valley Dam (which, if it goes ahead, would flood one of the few remaining tracts of tropical rainforest in India and condemn the last surviving colony of liontailed macaques to extinction) chose to denigrate their opponents as "monkey lovers" who would deny their fellow men the "fruits of progress" for the sake of "a few wild animals."

At best, it is assumed that the interests of wildlife can be protected by striking some sort of balance between conservation and development. Under pressure from environmentalists—and, perhaps more to the point, the tourist industry—many Third World governments have set up national parks and wildlife sanctuaries in order to safeguard the future of their wildlife. Such parks, however, have failed miserably to stem the loss of wildlife to development. Slowly but surely, the enclaves have been whittled down in size as their lands have been encroached upon for "projects in the national interest." Eventually, the parks exist in the name only.

The dam-building industry and its government sponsors have shown few qualms about siting projects in "protected" areas. For example, the Thai government insists on

its right to build the Nam Choan Dam on the Kwae Yai River even though the dam will flood approximately four percent of the Thung Yai Wildlife Sanctuary. That sanctuary, together with the adjacent Huai Kha Khaeng Sanctuary, makes up a forested area of some 4,800 square kilometers. Today it is the most valuable remaining wildlife park in Thailand, a country which, in recent years, has been subject to devastating deforestation and habitat destruction.

If the dam is built, the whole area will be divided in two. Moreover, warns Philip Round, the staff ornithologist of the Association for the Conservation of Wildlife in Thailand, the resulting "development" will almost certainly bring "a flood of illegal settlers along the access road into the heart of the sanctuary area, which will bring attendant problems of large-scale deforestation and poaching." Such illegal settlers have already wrought havoc in the Salak Phra Wildlife Sanctuary (downstream from the proposed Nam Choan scheme), where the Srinakarin Dam already stands as a stark reminder of the Thai government's "commitment" to preserving the integrity of its national parks. If the Nam Choan Dam goes ahead, then the largest population of Asian elephants in Thailand, as well as other threatened species such as the guar and the tapir, could face destruction. Flooding the area could also lead to the destruction of the riverine habitat of the rare green pea fowl, a species that has already been eliminated from 95 percent of the country.

In Sri Lanka, the project area for the Mahaweli scheme contains parts of the Pollunnaruwa, Seruwila and Allai wildlife sanctuaries. Already, the building of the Mahaweli dams has led to the logging of the Somawathie Wildlife Sanctuary (which covers an area of 22,275 hectares) by the State Timber Corporation. A further 30,000 hectares of forest elsewhere have also been earmarked for

logging. The scheme will seriously disturb valuable wetland habitats along the banks of the Mahaweli. More than 50 *villus* (the Sinhalese term for the pools that accumulate in the flood of plains of rivers) will be flooded, the affected areas ranging from 10 to 900 hectares in size. Those *villus* are extremely productive biologically, and their vegetation provides an important source of grazing for wildlife. During the wet season, wildlife moves from the inundated flood plains to higher ground, but it returns to the *villus* with the beginning of the dry season.

Not surprisingly, the Mahaweli scheme will seriously affect the habitat of many animals, including the Indian elephant, the leopard, the red-faced malkoha (which is endemic to Sri Lanka), the swan crocodile, the estuarine crocodile, the Bengal monitor and the python. The project will also seriously reduce the habitat of a number of threatened species, such as the purple-faced langur and the toque macaque, both endemic to Sir Lanka. In particular, the project is likely to prove disastrous for Sri Lanka's dwindling elephant population. Eight hundred elephants are said to inhabit the project area, and an important migratory route will disappear when the dams are closed. In addition, some eight species of fish, four species of amphibians, 19 species of reptiles, eight species of birds, three species of mammals and 53 species of plants – all endemic to the island – will be threatened by the scheme.

In North Perak, northern Malaysia, the Temenggor Dam has drowned valuable forests, threatening the survival of 100 species of mammals and 300 species of birds. Most of these species are already near extinction. Most severely affected have been the Sumatran rhinoceros, the Malayan tapir, the Malayan elephant and the flying lemur.

Had it not been for the efforts of local conservationists, the Malaysian government would almost certainly have gone ahead with plans to dam the Tembeling River in the

Taman Nagara National Park, the only national park in northern Malaysia. The dam would have created a 130-square-kilometer lake and would have destroyed the habitat of a number of species, including the highly threatened Sumatran rhinoceros, the Malayan tiger and the Malayan tapir. All this to add a mere 2.9 percent to the country's total energy capacity.

Not only in the Third World have governments been less than receptive to conservation. The Tasmanian government, for instance, was utterly determined to go ahead with its plans to dam the Gordon and Franklin Rivers although the area had been declared a heritage site. The proposed dam was halted only after the Australian federal government took the State of Tasmania to court. Peter Thompson, of the Australian Conservation Foundation, describes what would have been lost if the dam had been built: "The vegetation of the Gordon and Franklin Rivers is a mosaic of rainforest, wet schlerophyll, scrub heathland, sedgeland and bog communities. The rainforests are composed of species such as myrtle (*Nothofagus cunninghamii*), sassafras (*Atherosperma moschatum*), leatherwood (*Eucryphia lucida*) and the now rare Huon pine (*Dacrydium franklinii*). Many of these species are loosely related to temperate rainforest species in New Zealand and Chile and it is supposed that they have common origins on the supercontinent of Gondwanaland." As originally proposed, the dam would have destroyed more than one-third of the Huon pine habitat.

Discussing the general effects of dams on wildlife, J. E. Bardach and B. Dussart note that "most species of large and small game have territories, home ranges and feeding circuits associated with the main stream of a river or its tributaries." It is this habitat, of course, that a dam floods. Since most animals "cling tenaciously to their home

grounds, the arrival of [the flood waters] spells death for most territorial creatures."

Unfortunately, where efforts have been made to rescue wildlife before a river is flooded—as was attempted in "Operation Noah," before the closing of the Kariba Dam—they have proved of limited success. Even if individual animals in the area to be flooded are rescued, few will be able to breed, since they can do so only in a river valley like the one from which they have been driven. The same is true of those bird species that manage to escape drowning: a few will fly away, but once their natural habitat has been destroyed, their future breeding prospects are slim.

We must also remember that as "development" proceeds, the number of suitable habitats to which wild animals can be transferred is sharply reduced. Eventually, the wildlife has nowhere to go, and game wardens have little option but to slaughter displaced animals in vast numbers. For example, the present plan to build another huge dam on the Zambezi River (this time at Mutapa

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[three photographs omitted]

Caption:

Large dams have inundated habitat, reduced prey species and restricted territory of lion prides in Africa and leopards like this solitary young male in a Sri Lankan national park.

The proposed Mutapa Gorge dam on Africa's Zambezi River will shrink habitat of the endangered giant eland, dependent on floodplain grassland.

Gorge) in order to produce 500 megawatts of electricity will drown 130,000 hectares of giant mahoganies, acacia woods and lush savannah. That land is dotted with perennial watering holes that are vital to local wildlife. Because of the lack of suitable habitats elsewhere, inundation will force game wardens to slaughter at least half of the area's present population of elephants, buffaloes, lions, leopards, elands, sables and other animals.

At present, the argument in favor of conservation that is most likely to make any impression on government planners is an economic one—the claim that wildlife must be preserved for the sake of the tourist industry. That argument is being used by the well-known environmentalist Dick Pitman in his efforts to prevent the flooding of the Mutapa Gorge. Other points out that a large population of herbivores inhabits the savannahs and grasslands that are so often flooded by dams. If ranched, these animals could provide as much food as the fisheries developed in the artificial lakes that will drown them.

Such arguments have so far failed to impress the politicians. Indeed, the idea that the future of man is linked with that of such species as the lion or the elephant—let alone the termite or the snail—is still alien to the most influential of today's development planners. Yet, as Paul and Anne Ehrlich point out in the book *Extinction*, the very subtlety of the relationships among the species in a natural ecosystem makes it impossible to predict whether or not any one species can be lost with impunity. To be sure, throughout history, animals have become extinct, but who knows which new extinction will prove fatal to the survival of life on this planet?

To make the point, the Ehrlichs use the analogy of an airplane passenger who boards his airplane only to find that engineers are busily removing the rivets from the wings. "Don't worry," they tell him cheerfully, "we've lost

numerous rivets in the past—and nothing disastrous has happened." Who, ask the Ehrlichs, would consider traveling on such an airline? Yet, they point out, our indifference to the fate of wildlife suffers from the same flawed thinking as that of the rivet-poppers. How many more animal "rivets" can be popped without causing the destruction of "spaceship earth"? □

Edward Goldsmith and Nicholas Hildyard are editors of The Ecologist, bimonthly magazine of the Wadebridge Ecological Centre in Cornwall. This article is adapted by permission from part of The Social and Environmental Effects of Large Dams, *to be published in May by Sierra Club Books, copyright © 1984 by Edward Goldsmith and Nicholas Hildyard.*

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS,

VS.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANT

AFFIDAVIT OF JOYCE M. KELLY

District of Columbia) ss.

Joyce M. Kelly, being duly sworn, states:

1. I am President (Chief Executive Officer) of Defenders of Wildlife.

2. I have over a decade of professional experience in the management and conservation of natural resources including in part, directing the Wilderness Program of the Bureau of Land Management of the United States Department of the Interior.

3. I make this affidavit of my own knowledge and, if called upon to testify, could testify to the matters herein.

4. I visited Israel and Egypt in May of 1986. As I intended, I enjoyed and observed the habitat of the en-

dangered Eurasian peregrin falcon and hoped to see that species and others including the endangered nile crocodile there.

5. I will suffer harm in fact as the result of American aided development in these countries including the Bureau of Reclamation's nine-year role (1982-91) in overseeing the rehabilitation of the Aswan High Dam on the Nile in Egypt and the development by the Bureau with Egypt's Ministry of Irrigation of the Master Water Plan. This plan will be "a comprehensive guide for developing and managing Egypts water resources." (*Water for the World*, Bureau of Reclamation, attached, p. 8) I have observed the traditional habitat of the endangered nile crocodile there and and intend to do so again, and hope to observe the crocodile directly. I appreciate its existence in the Nile River system.

6. I plan to return to Egypt and Israel and plan to go to South America also with the intention of studying endangered and threatened wildlife in those areas.

DEFENDERS' INTERESTS

7. To achieve Defenders of Wildlife's chief goal "to preserve, enhance and protect the natural abundance and diversity of wildlife including the integrity of natural wildlife ecosystems", Defenders' Board of Directors on April 30, 1983 adopted a general policy statement which included the strategy of addressing "international issues primarily through the avenues of influence provided by domestic government and international non-governmental organizations." This was simply a restatement of our long-held and continuing direct interest in international wildlife and its conservation. (Defenders By-Laws, Policy and Program Mission Statements are attached.)

8. Defenders of Wildlife has been actively involved in the negotiation and implementation of landmark international wildlife treaties such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention) (CCMA). Defenders has had official representatives at CITES and other international wildlife convention meetings, including the Bonn Convention.

• Defenders has in recent years retained Simon Lyster, author of *International Wildlife Law* (Grotius, Ltd., England, 1985) as counsel, magazine correspondent, and as one of our representatives at formal and informal meetings on international law and treaties such as those cited in the Endangered Species Act (Sections 2, 8, 8A, 15).

• Defenders has consistently supported and sought to strengthen the United States laws and programs protecting wildlife nationally and internationally, particularly the Endangered Species Act and programs authorized and duties required thereunder.

9. Defenders of Wildlife has actively worked for the conservation of foreign species through the U.S. Endangered Act. For example, Defenders has actively reviewed and submitted written comments on the proposed changes in the classification and/or regulations for listed foreign species such as the leopard and the kangaroo. Further, Defenders brought a lawsuit in 1981 challenging Department of the Interior regulations which repealed a 1974 import ban on the hides and meat of kangaroos threatened with extinction.

10. In further example, in 1985, the National Marine Fisheries Service (NMFS) listed the Gulf of California Harbor Porpoise as endangered in response to Defenders' 1978 petition. The Gulf of California harbor porpoise ex-

ists only in Mexican waters. Defenders has remained actively involved in the recovery process for the species by persuading Congress to provide funds for fiscal years 1986 and 87 through the Congressional appropriations process for NMFS to plan and conduct recovery efforts on behalf of the porpoise.

11. Defenders has sought to ensure funding to implement the Western Hemisphere Convention through the Congressional appropriations process as authorized in Section 8A(e) and Section 15(d) of the Endangered Species Act.

12. Defenders' staff attended both the negotiating convention held in Bonn, West Germany in 1979 and the first meeting of the parties held in Bonn in 1979 as approved official observers. Defenders played a leadership role in developing a coordinated, worldwide, non-governmental organization, position paper on the draft CCMA text which was distributed to all the governmental delegations assembled to negotiate the treaty.

13. Defenders' staff has attended and participated in four of the five regular biennial Conferences of the Parties to CITES as approved official observers. Defenders' unique expertise has often been solicited by governmental delegates at these meetings.

14. Defenders' representative served as a member of the U.S. delegation to the Special Working Group of the Parties to CITES in Geneva, Switzerland in 1977. Most recently, Defenders' representative attended the Technical Expert Committee meeting as an observer this year in Lausanne, Switzerland.

15. Defenders has long kept our members informed about and interested in international wildlife issues through publication of articles on wildlife overseas in numerous issues of *Defenders* magazine. A list of the ar-

ticles in wildlife in foreign countries and international waters from 1980 through 1986 is attached. (See also ESA Report, Saving Endangered Species, attached, Consultation Section, pp. 22-23.)

• In the early 1970's, then Defenders of Wildlife Board member Edward Steele launched a campaign to help solve Madagascar's ecological problems which threatened the island's endangered wildlife, particularly the many rare and endangered species of lemurs. In April 1975, *Defenders* magazine devoted an entire issue to Madagascar's wildlife (copy attached). The first article in the issue was entitled, "Madagascar's Endangered Wildlife". It mentions Dr. Robert Sussman, an anthropologist who is also a lemurologist at Washington University. Dr. Sussman, a Defenders member and recent Board member, has been a leader in the conservation of this wildlife and its habitat and has recently received an award from its government. Any U.S. activity there which encourages the further deforestation of the island is likely to affect these endangered species to the detriment of Dr. Sussman and other Defenders members.

• After the publication of "Dams" in *Defenders* May/June 86 issue, scores of Defenders members wrote the head of the World Bank protesting Bank funding of such multi-dam projects as the Narmada Valley Project now underway in India. It will include 30 major dams, 135 medium-sized dams and more than 3000 small dams over the next 50 years. The first phase alone will inundate 11% of the Narmada River basin's forests and with them much of the areas wildlife and its habitat. These include 35,000 acres of teak forest, traditionally harvested with the labor of asian elephants. ("Dams", Ibid., and *Bankrolling Disasters,* International Development Banks and the Global Environment, Sierra Club, 1986, copy attached.)

• Defenders of Wildlife and its members, e.g., – affidavits of Elliot McClure and Amy Skilbred, myself included, have been harmed, are being harmed and will be further harmed, in fact, by the detrimental effects of the U.S. agency actions supporting projects named and described in the Plaintiffs' complaint, supporting memoranda and affidavits, among others, on the species named and described in those documents, among others.

• Defenders' members include many who enjoy and study in Zoological Parks in the United States endangered and threatened wildlife from foreign countries, such as the asian elephant whose population will be diminished by A.I.D. and other agency actions in asia including Sri Lanka and Thailand as noted in the affidavits of Eliot McClure and Amy Skilbred. To the extent that these elephants and other species become less available for zoos in the U.S. due to their further endangerment overseas, these Defenders members will be harmed. Captive breeding efforts for many of the species, and thus their conservation, will also be harmed.

• There is a growing controversy over the lack of investigation, mitigation and conservation efforts undertaken by U.S. agencies concerning actions affecting endangered and threatened species and species which are likely to become so threatened and endangered in foreign countries.

• The question of whether consultation is required, as finally presented in the final regulation of the Secretary concerning the consultation process under Section 7 of the Act, is a specific and immediate example or a case in point of that controversy requiring resolution in order to avoid further harm as a result of the U.S. agency actions described in plaintiffs' submissions, among other U.S. actions.

• The relief the plaintiffs have requested, including the requirement in regulations of the Interior Department that agencies consult with Interior concerning the effects of their actions on threatened and endangered species in foreign countries, will prevent or reduce harm to the very interests the Endangered Species Act was designed to protect, including the interests of Defenders and its members.

• Defenders of Wildlife and its members will benefit from the reduction in harm and avoidance of jeopardy to and the opportunity for enhanced conservation and of the listed species that the requested consultation between agencies is intended to bring about.

/s/ Joyce M. Kelly
JOYCE M. KELLY

DISTRICT OF COLUMBIA, SS:

Subscribed and sworn to before me
this 6th day of November, 1986.

/s/ June M. Leartoan
Notary Public
My Commission Expires October 14, 1991

BY-LAWS OF DEFENDERS OF WILDLIFE as of May 3, 1986

ARTICLE I. NAME: BODY CORPORATE

The name of this Society shall be Defenders of Wildlife, with principal offices in Washington, D.C.

The persons who shall be the body politic and corporate, by name of Defenders of Wildlife, are and shall be the original incorporators as designated in the Certificate of Incorporation under the Laws of the District of Columbia and the persons who shall from time to time hold the office of Directors of this society.

ARTICLE II. PURPOSES

Defenders of Wildlife is a national, non-profit organization dedicated to preserving wildlife and promoting humane treatment of wildlife animals, emphasizing appreciation and protection for all species in their ecological role within the natural environment.

Through communication, education, and responsive action, Defenders of Wildlife endeavors to encourage improved public attitudes and policies for all living things.

ARTICLE III. ORGANIZATION AND MANAGEMENT

SECTION 1. BOARD OF DIRECTORS. The control and administration of the affairs and funds of the Society shall be by a Board of Directors of not more than twenty-four (24) persons, one-third of whom shall be elected each year in accordance with Section 3 of this Article. In addition to the foregoing, if at the end of his service as a Director by reason of Section 3(b) of this Article a person is Chairman (or immediate past Chairman) he shall, if he so desires, serve as a Director and as Immediate Past Chairman for a further term of one year.

SECTION 2. MEETINGS. The Board of Directors shall hold an Annual Meeting of the Society in April (or at such other time each year as may be determined by the Executive Committee after consultation with the President), and such other regular or special meetings of the Board as it may determine or as may be called by the Chairman or by any eight members of the Board, as such times and places as the notice may specify. At all such meetings eight members of the Board shall constitute a quorum. When a quorum is present at any meeting a majority of the Directors present shall decide any questions brought before the meeting, except as otherwide provided by law or by these By-Laws. Notice shall be given by the Chairman of the Secretary to each member of the Board at least five days prior to the holding of each such meeting.

SECTION 3. ELECTION OF DIRECTORS

(a) The Directors shall be elected prior to the Annual Meeting of the Society by the membership voting by written ballot. The persons elected will be those having the highest number of votes. Each Director shall hold office for a period of three years or until his successor is elected, and shall be eligible for re-election as hereinafter set forth.

(b) Effective at the 1974 Annual Meeting, any person who shall have served three consecutive full three-year terms shall be ineligible for re-election to the Board for a period of one year after the termination of the third consecutive term. In in any election more than three persons would be rendered ineligible by the preceding sentence, only those three with the longest service shall be ineligible.

(c) Any vacancy in the office of Director, Officer, or member of the Executive Committee may be filled for the unexpired term at any duly called meeting of the Board of Directors by vote of a majority of those Directors who vote. Service for an unexpired term under this paragraph shall not be counted against the periods relating to eli-

gibility for re-election specified in the preceding paragraph. Directors so elected shall take office immediately.

(d) Directors elected pursuant to paragraph 3(a) above shall take office at the end of the ensuing Annual Meeting.

SECTION 4. OFFICERS

(a) *Elective Officers.* The elective officers of the Society shall be a Chairman of the Board (Chairman), one or more Vice Chairmen, a Secretary, and a Treasurer, who shall be elected from the members of the Board of Directors at the Annual Meeting and shall serve for one year or until their successors are elected. Except as may be authorized by the Board for special services, all such officers shall serve without compensation, but they may be allowed their reasonable expenses in attending to the business of the Society, as the Board may determine.

(b) *Appointive Officers.* The appointive officers of the Society shall be a President, who shall be the Society's chief staff officer, and such other officers as the Board of Directors may from time to time determine. All officers to whom this paragraph applies shall be appointed by the Board at such times and on such terms as it shall establish, provided that the President, or any officer acting in his place, shall be entitled to attend and to speak at the meetings of the Board, the Executive Committee, and other committees, excepting executive sessions. No appointive officer, other than an Assistant Secretary and Assistant Treasurer, shall be a member of the Board of Directors during his term of office.

SECTION 5. EXECUTIVE COMMITTEE. The Executive Committee shall consist of the elected Officers, the Immediate Past Chairman, if any, as provided for by Section 1 of this Article, and not to exceed four other members of the Board elected from its number at the Annual Meeting. The Chairman of the Board shall serve as chairman of the Committee. The Executive Committee

shall possess and exercise all of the powers, authority and functions of the Board of Directors subject to review and ratification of the Board. During the intervals between the meetings of the Board of Directors, the Executive Committee shall supervise the affairs of the Society, act for and carry out the established policies of the Society as defined by the Board, and approve expenditures and commitments according to rules prescribed by the Board. The Executive Committee shall hold regular meetings as required for the business of the Society at such times and places as it may determine, and special meetings may be called at any time by the Chairman or any three members of the Committee. At least three days' notice of each meeting of the Executive Committee shall be given to its members, and at all such meetings a majority of the Committee shall constitute a quorum. The Executive Committee shall keep adequate minutes of all its meetings, which shall be circulated to all members of the Board of Directors.

SECTION 6. DUTIES OF THE OFFICERS. The elected Officers shall perform the usual functions and duties of such officials. The Chairman shall be the senior officer of the Society with general responsibility for its functioning, through the President, between meetings of the Board of Directors and Executive Committee; the Chairman (or in the absence of the Chairman, the senior Vice Chairman present) shall preside at all meetings of the Board and Executive Committee. The Secretary shall record the activities of the Board of Directors and the Executive Committee. The Treasurer shall have the care and custody of the funds of the Society and shall render an Annual Report to the Board of Directors for the calendar year ending December 31st of each year. Such reports are to be audited at such times and in such manner as the Board may direct.

SECTION 7. COMMITTEES.

(a) *Finance Committee.* There shall be a Finance Committee consisting of the Chairman of the Board, the Treasurer (who shall serve as chairman) and not more than three other persons elected by the Board from its membership. The Finance Committee shall have responsibility for supervising the disbursements and investments of the funds the Society, subject to the Annual Budget and overall policy guidance and instructions from the Board. The Committee shall make a report on the finances and investments of the society at each meeting of the Board of Directors.

(b) The Board of Directors or the Executive Committee may create such other Committee as either may deem necessary for the accomplishments of the objectives of the Society. Members of such Committees shall be appointed by the Chairman subject to approval by the Board or the Executive Committee, as the case may be. Members of the Society, Directors, and Officers shall be eligible for membership on all Committees so created. Decisions made by all such Committees shall be subject to approval of the Board or the Executive Committee unless the resolution creating the Committee specifies otherwise.

SECTION 8. NOMINATIONS and ELECTIONS

(a) *Election of Nominating Committee*—At the Annual Meeting, a Nominating Committee of five (5) members shall be elected by the Board of Directors.

(b) *Nomination and Election of Directors*

(i) Prior to October 1 of each year, notice shall be given to the membership, by publication in the Magazine, or by other means reasonably calculated to inform the members, that proposals of individuals to serve on the Board of Directors may be sent to the Nominating Committee at Defenders' Headquarters. The notice shall set a

deadline for the receipt of said proposals. All proposals shall be accompanied by a brief statement of the candidate's qualifications.

(ii) Not later than December 1, the Nominating Committee shall submit a list of nominees to the Board of Directors. Within thirty (30) days thereafter, any Director, with the written concurrence of seven (7) other Directors, may nominate any person whose name and qualifications were submitted to the Nominating Committee prior to the deadline date and was not included on the list of nominees, provided that person has consented in writing to his nomination. Each person so nominated shall be added to the list of nominees.

(iii) The final list of nominees, accompanied by a statement of their qualifications, a ballot form and a return envelope, shall be mailed to the members of the Society at least sixty (60) days prior to the Annual Meeting.

(iv) All ballots shall be tabulated not less than fifteen (15) days prior to the Annual Meeting. The ballots shall be counted by tellers appointed by the Chairman, or if appropriate, by a disinterested person or agency designated by the Chairman. The results shall be announced at the Meeting and in the first issue of the Magazine published thereafter.

(c) *Nomination and Election of Elective Officers*

(i) The Nominating Committee shall also make nominations for officers to be elected by the Board of Directors. The Committee's nominees and any election rules proposed by the Chairman shall be transmitted with the Notice of Annual Meeting to all members of the Board of Directors not less than thirty (30) days prior to the Annual Meeting.

(ii) The results of the election of officers shall be announced in the issue of the Magazine which reports the election of Directors.

SECTION 9. PUBLICATIONS. The Board of Directors may provide for periodicals or any other publications necessary and proper for promoting and carrying out the objects of the Society.

SECTION 10. FISCAL YEAR. The Fiscal year of the Society shall be the calendar year.

ARTICLE IV. MEMBERSHIP

Membership in the Society shall be in such classes and with such respective contributions, benefits and privileges, as the Board of Directors may from time to time determine by formal resolution.

ARTICLE V. LOCAL CHAPTERS

SECTION 1. Local chapters to assist and promote the objects of the Society may be organized, but they shall not be permitted to use the name of the Society until they have been issued a charter by direction of the Board of Directors or the Executive Committee, and signed by or on behalf of the Chairman. Upon issuance of such a charter, the chapter may use the Society's name with an appropriate identifying clause, such as "Defenders of Wildlife, _____ Chapter," and shall in all respects comply with the terms of the charter.

SECTION 2. If and when any such chapter is to be organized, the proposed By-Laws must first be submitted for approval by the National Society's Board of Directors or Executive Committee. These By-Laws shall make appropriate reference to the articles of incorporation of the

National Society, Defenders of Wildlife, and shall state objects of the chapter that are substantially the same as the objects of this Society.

SECTION 3. It shall be the duty of the local chapters to develop local programs consistent with, and to assist and promote, the objectives of the National Society.

SECTION 4. The Society stands willing, and expects, to cooperate with other organizations with similar objectives. However, no unit of the Society, whether national or local, shall enter into official affiliation with any other organization in such manner as to subordinate the Society or to commit it to policies or activities determined by others.

SECTION 5. The charter of any local chapter may be suspended or revoked, but only for cause, by a three-fourths vote of the Board of Directors or Executive Committee. No such action shall be taken without at least thirty days' notice and an opportunity to be heard. Such notice shall set forth the charges and be sent in writing to the chief officer of the chapter, who shall, upon request, be granted a hearing before the Board of Directors or Executive Committee, as the case may be.

ARTICLE VI. PARLIAMENTARY AUTHORITY

The rules contained in the current edition of Robert's Rules of Order Newly Revised shall govern the Society in all cases to which they are applicable and where they are not inconsistent with these By-Laws and any special Rules of Order the Society may adopt.

ARTICLE VII. AMENDMENTS

These By-Laws may be amended by a two-thirds vote of the members of the Board of Directors present and voting

at any meeting of the Board. Not less than 20 days' notice of each proposed amendment shall be given to the Board in writing through the Chairman of the Board.

# # #

DEFENDERS OF WILDLIFE

May 1984

General Policy Statement

Overall Policy

The goal of Defenders of Wildlife is to preserve, enhance, and protect the natural abundance and diversity of wildlife including the integrity of natural wildlife ecosystems. Defenders recognizes the intrinsic value of wildlife, the importance of its humane treatment and the many benefits of wildlife to society. Defenders seeks to achieve its goals through education and reasoned advocacy of appropriate public policies.

Basic Concerns

The earth's wild flora and fauna are increasingly threatened by environmental degradation, species extinction, and the destruction of natural habitat and wildlife itself. Defenders of Wildlife is dedicated to reversing these trends. To protect indigenous wildlife and its natural habitat, Defenders will address such issues as:

1) The decline and consequent threat of extinction of individual species;
2) The artificial manipulation of species abundance by consumptive interests;
3) The regional loss of species once present;
4) Environmental degradation
5) Inhumane treatment of wildlife.

Strategies

To achieve these goals and to address these concerns, Defenders will:

1) Monitor federal and state wildlife policies and take appropriate action to achieve sound policies and decisions in administrative, legislative and judicial forums;
2) Educate and build an effective, informed constituency dedicated to influencing public policy and practices on matters affecting wildlife;
3) Assemble, analyze, and disseminate scientific data and policy information on wildlife issues;
4) Raise public awareness of wildlife issues through the media, Defenders magazine, educational materials, public appearances and other activities;
5) Cooperate with other organizations and individuals who share Defenders' objectives on any wildlife issues;
6) Address international issues primarily through avenues of influence provided by domestic government and international non-governmental organizations.

Adopted by the Board of Directors
on April 30, 1983

DEFENDERS OF WILDLIFE

May 1984

Program Mission Statements

Endangered Wildlife

Defenders seeks to preserve the natural diversity of wild fauna and flora threatened by an accelerated rate of population decline or extinction. The program seeks to prevent extinction of depleted, threatened and endangered species by ensuring that domestic and international law and its implementation protects these species and their critical habitats, and promote species recovery.

Wildlife on Public Land

Defenders seeks to protect and enhance the integrity of natural wildlife ecosystems on the publicly owned lands in the United States as a public trust. To this end, Defenders promotes protective designations, acquisitions and public land use policies which provide maximum benefits for wildlife and its habitat.

Wildlife Management

Defenders seeks to promote ecosystem management designed to preserve and enhance natural abundance and diversity, and to improve traditional management philosophies to benefit all wildlife. Defenders seeks to increase public awareness of wildlife management issues and to promote citizen participation in wildlife management decisions.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS

vs.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANT

AFFIDAVIT OF H. ELLIOTT McCLURE

State of California)
) ss.
County of Ventura)

H. Elliott McClure, being duly sworn, states:

1. I am a member of Defenders of Wildlife and have been a member since the early 1950's. Since 1978 I have been a member of the Board of Directors and am currently Chairman of the Tropical Wildlife-International Committee of Defenders' Board of Directors.

2. I make this affidavit of my own knowledge and, if called upon to testify, could testify to the matters herein.

PERSONAL INTERESTS

3. I am a biologist and have authored over 125 publications, (*curriculum vitae* and partial list of publications

attached) with a heavy emphasis on wildlife conservation in Japan and Southeast Asia where I lived from July 1950 to July 1975 and where I did study and enjoy, and continue to study and enjoy endangered asian elephants, tigers, Rhinos, helmeted hornbills, and other endangered wildlife, and their habitat as often as possible.

4. I served as ecologist for the Walter Reed Army Institute of Research in Japan for 11 years, in Thailand for 9 years, and in Malaya for 5 years.

5. I have visited, studied, and taken a continuing personal and professional interest in endangered wildlife such as tigers, asian elephants, Sumatran rhinos, helmeted hornbills and their habitat in Thailand and Malaysia.

6. I wrote an article which was published in *Defenders* Dec 82/Jan 83 issue entitled, "Malaysian Reserves in Danger" (p. 34 copy attached). In the same issue was another article entitled "Goodbye Malaysia's Wildlife?", (p. 29*ff* copy attached).

7. Since I left S.E. Asia, I have returned to study and enjoy these species and their habitat. I plan to return to Thailand and Malaysia to continue my enjoyment of and research on wildlife. I am also sponsoring continued research on endangered helmeted hornbills and other hornbills in Thailand. Furthermore, I serve on the Hornbill Working Group of the International Committee for the Protection of Birds, perhaps the oldest international wildlife conservation group in the world.

8. United States aid and funding for dams and development in both of these countries have harmed, are harming, and continue to pose a risk of harm to the endangered wildlife I study and enjoy (including but not limited the species noted above) and its habitat. These include the endangered asian tapir and the largest population of Asian elephants in Thailand which will be destroyed if the Nam Choan Dam, which is to be funded with U.S. funds

through the World Bank, is built as proposed on the Kwae Yai River. (See attached article, "Dams" by Goldsmith and Hildyard, 19-32, at 29, *Defenders* May/June 86.)

• The Bureau of Reclamation, in its publication (p. 4, copy attached) "Water for the World", notes that among the projects its has aided in more than 115 nations, it has planned and proposed a project for a dam the size of the Grand Coulee on the Lower Mekong River Basin in Thailand and Laos with a reservoir that could irrigate 4.9 million acres. This will harm endangered wildlife including but not limited to the asian elephant and tiger, and thus harm me, personally and professionally.

9. United States funds and Treasury Department approval of World Bank loans have made possible the destruction of portions of 100 species of mammals and 300 species of birds, most already near extinction, such as the Sumatran rhinoceros, the Asian tapir and elephant (all endangered) by the building of the Temenggor Dam in North Perak, Malaysia. (Dams, at 30.)

10. The Taman Nagara National Park and its endangered rhinos, tigers, and tapirs in northern Malaysia have been threatened with partial inundation by a dam on the Tembeling River that would have been funded by the World Bank. The plans have been halted for now as far as I know. (*Id.*) I have enjoyed and studied this park and its wildlife. I guided a tour of 25 people through the park in 1983. I hope to do so again in the future.

11. The destruction of endangered wildlife in these and other areas harms me personally and professionally by depriving me of the subjects of my enjoyment, of the subjects of the research, publication and other elements of my career, and of a significant part of the environment that sustains healthful life, including my own.

12. Requiring consultation between the Secretary of the Treasury and others and the Secretary of the Interior

under the Endangered Species Act would help avoid harming and jeopardizing the endangered wildlife now threatened by the projects described in this affidavit and other U.S. agency actions. Therefore such consultation would prevent personal and professional harm to me.

DEFENDERS' INTEREST

13. To achieve Defenders of Wildlife's chief goal "to preserve, enhance and protect the natural abundance and diversity of wildlife including the integrity of natural wildlife ecosystems", Defenders' Board of Directors on April 30, 1983 adopted a general policy statement which included the strategy of addressing "international issues primarily through the avenues of influence provided by domestic government and international non-governmental organizations." This was simply a restatement of our long-held and continuing direct interest in international wildlife and its conservation. (Defenders By-Laws, Policy and Program Mission Statements are attached.)

14. Defenders of Wildlife has been actively involved in the negotiation and implementation of landmark international wildlife treaties such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention) (CCMA). Defenders has had official representatives at CITES and other international wildlife convention meetings, including the Bonn Convention.

• Defenders has in recent years retained Simon Lyster, author of *International Wildlife Law* (Grotius, Ltd., England, 1985) as counsel, magazine correspondent, and as one of our representatives at formal and informal meetings on international law and treaties such as those cited in the Endangered Species Act (Sections 2, 8, 8A, 15).

• Defenders has consistently supported and sought to strengthen the United States laws and programs protecting wildlife nationally and internationally, particularly the Endangered Species Act and programs authorized and duties required thereunder.

15. Defenders of Wildlife has actively worked for the conservation of foreign species through the U.S. Endangered Act. For example, Defenders has actively reviewed and submitted written comments on the proposed changes in the classification and/or regulations for listed foreign species such as the leopard and the kangaroo. Further, Defenders brought a lawsuit in 1981 challenging Department of the Interior regulations which repealed a 1974 import ban on the hides and meat of kangaroos threatened with extinction.

16. In further example, in 1985, the National Marine Fisheries Service (NMFS) listed the Gulf of California Harbor Porpoise as endangered in response to Defenders' 1978 petition. The Gulf of California harbor porpoise exists only in Mexican waters. Defenders has remained actively involved in the recovery process for the species by persuading Congress to provide funds for fiscal years 1986 and 87 through the Congressional appropriations process for NMFS to plan and conduct recovery efforts on behalf of the porpoise.

17. Defenders has sought to ensure funding to implement the Western Hemisphere Convention through the Congressional appropriations process as authorized in Section 8A(e) and Section 15(d) of the Endangered Species Act.

18. Defenders' staff attended both the negotiating convention held in Bonn, West Germany in 1979 and the first meeting of the parties held in Bonn in 1979 as approved official observers. Defenders played a leadership

role in developing a coordinated, worldwide, non-governmental organization, position paper on the draft CCMA text which was distributed to all the governmental delegations assembled to negotiate the treaty.

19. Defenders' staff has attended and participated in four of the five regular biennial Conferences of the Parties to CITES as approved official observers. Defenders' unique expertise has often been solicited by governmental delegates at these meetings.

20. Defenders' representative served as a member of the U.S. delegation to the Special Working Group of the Parties to CITES in Geneva, Switzerland in 1977. Most recently, Defenders' representative attended the Technical Expert Committee meeting as an observer this year in Lausanne, Switzerland.

21. Defenders has long kept our members informed about and interested in international wildlife issues through publication of articles on wildlife overseas in numerous issues of *Defenders* magazine. A list of the articles in wildlife in foreign countries and international waters from 1980 through 1986 is attached.

• In the early 1970's, then Defenders of Wildlife Board member Edward Steele launched a campaign to help solve Madagascar's ecological problems which threatened the island's endangered wildlife, particularly the many rare and endangered species of lemurs. In April, 1975, *Defenders* magazine devoted an entire issue to Madagascar's wildlife (copy attached). The first article in the issue was entitled, "Madagascar's Endangered Wildlife". It mentions Dr. Robert Sussman, an anthropologist who is also a lemurologist at Washington University. Dr. Sussman, a Defenders member and recent Board member, has been a leader in the conservation of this wildlife and its habitat and has recently received an award from its government.

Any U.S. activity there which encourages the further deforestation of the island is likely to affect these endangered species to the detriment of Dr. Sussman and other Defenders members.

• After the publication of "Dams" in *Defenders* May/June 86 issue, scores of Defenders members wrote the head of the World Bank protesting Bank funding of such multi-dam projects as the Narmada Valley Project now underway in India. It will include 30 major dams, 135 medium-sized dams and more than 3000 small dams over the next 50 years. The first phase alone will inundate 11% of the Narmada River basin's forests and with them much of the areas wildlife and its habitats. These include 35,000 acres of teak forest, traditionally harvested with the labor of Asian elephants. ("Dams", Ibid., and *Bankrolling Disasters*, International Development Banks and the Global Environment, Sierra Club, 1986, copy attached.)

• Defenders of Wildlife and its members, including me, have been harmed, are being harmed and will be further harmed by the detrimental effects of the projects named and described in this statement, among others, on the species named and described in this statement, among others.

• Defenders of Wildlife and its members will benefit from the reduction in harm and avoidance of jeopardy to the listed species that the requested consultation between agencies is intended to bring about.

/s/ H. Elliott McClure
H. ELLIOTT MCCLURE

Subscribed and sworn to before me
this 5th day of November, 1986.

/s/ Linda Krebs
Notary Public
[SEAL]
My Commission Expires Jan. 31, 1989

Further statement by Dr. McClure:

I have consulted with my colleague Dr. Ardith Eudey, of Upland, Calif., who has recently returned from Thailand. For the past fifteen years she has been conducting studies of primates at Huey Khakeng a wildlife refuge adjacent to the area that will be inundated by the Nam Choan Dam on the Kwai Yai River. She found during her visit there early this year that the dam was already under construction with access roads, etc. The Thai government is committed to this hydro-electric dam and would probably seek money for its completion from Japan or Germany if it is not available from the World Bank.

No adequate environmental impact survey of the effects of the dam and its accompanying impoundment were ever made. Biologists in the region including myself and Dr. Eudey are concerned because the flooded areas will disrupt the migration routes of Asian elephants that move annually from Thailand into Burma. It will also flood important lowland forest in the Thung Yai wildlife refuge adjacent to it. Other rivers in the region may also be under consideration for hydroelectric dams.

The history of the public attitude in Thailand toward areas devoted to the preservation of ecosystems and wildlife has been that such actions are infringements on their rights to harvest both trees and animals. Because of this, opening the forest for the construction of dams or highways brings about the immediate destruction of trees and animals by uncontrolled poaching.

The penetration of these forests by commercial and government projects is of great concern to me and other American and European biologists whose work is interrupted and damaged by such efforts, as well as the continued loss of plants and animals of world-wide interest.

Curriculum Vitae

DR. H(OWE) ELLIOTT McCLURE

Address: 69 E. Loop Drive, Camarillo, Calif. 93010

Home Phone: (805) 482-0411

Born: Chicago, Ill., 29 April, 1910

Married: 1 Oct. 1933, Lucy Esther Lou Fairchild (Born 4 Aug. 1910, Danville, Ill.)

Children: Lucy Jeannette, 12 Jan. 1941; Clara Ann, 1 June 1942.

Education:

B.S., University of Illinois, 1933, major, Entomology, minor, Zoology.

Phi Beta Kappa, Sigma Xi, Phi Etta Sigma, High Honors Grad.

M.S., Uni. of Ill., 1936, major, Entomology, minor, Animal Ecology.

Ph.D. Iowa State College, 1941, major, Wildlife Conservation

Employment:

Asst. Entomologist; Illinois State Natural History Survey, 1930-33.

Research; Tree Expert, Illinois Tree Service Co., 1934-35, 1936-37.

Grad. Asst.; Iowa State Col., 1937-41, Iowa Coop. Wildlife Unit, 1938-41 (Mourning Doves).

Biologist and Wildlife Technician; Game Forestation and Parks Comm., Nebraska, 1941-44, Upland gamebird research.

Hospital Corps; U.S.N.R. 1942-45, Entomologist.

Biologist; U.S Public Health Service and the Hooper Medical Foundation, Uni. of Calif., 1946-50, Medical ornithological research. (at Bakersfield, Calif.)

Ornithologist; Univ. of Pittsburgh, 1950, Research in Japan.

Medical Ornithologist; 406th Medical General Lab., 1951-58, Research related to arthropod borne viruses in Japan.

Ecologist; U.S. Army Medical Res. Unit, Institute of Medical Research, Kuala Lumpur, Malaysia, 1958-63, Bionomics of Malayan birds.

Ornithologist and director; Migratory Animal Pathological Survey, Walter Reed Army Institute of Research. 1963-1975 (Bird Migration in Eastern Asia) 1963-66, Attached to U.S. Air Force in Japan, 1966-73, in cooperation with the Applied Scientific Research Corporation of Thailand, Bangkok. 1973-75, U.S. Army Medical Component, S.E.A.T.O., Bangkok, Thailand, Advisor to the Commanding Officer.

Retired: 30 June 1975.

Societies: Wilson Ornithological Club, Cooper Ornithological Club, American Ornithological Union, Wildlife Society, Ecological Society of America, America Entomological Society, New York Zoological Society, California Academy of Science, North-Eastern Bird-banding Assoc., Eastern Bird-banding Assoc., Inland Bird-banding Assoc., Western Bird-banding Assoc., (President 1948-50), Malayan Nature Society (Chairman, Selangor Branch 1960-62, President 1962-1963), National Geographic Society, National Parks Association, Defenders of Wildlife, Siam Society, Explorers Club.

Etcetera: President, Western Bird-banding Assoc., 1948-50; Chairman, Selangor Chapter, Malayan Nature Soc. 1960-62; Pres., Malayan Nature Soc. 1962-63; Pres., Friends of Khao Yai National Park, Thailand, 1972-73; Asst. Ed., Siam Soc. Natural History Bull. 1970-75; Board Member, Defenders of Wildlife 1978- Boy Scout leader for 25 years at Danville, Ill., Lewis, Iowa, Ord, Nebr., Vallejo, Calif., Tokyo, Japan. Received Silver Beaver in 1958. 125 publication in Entom., Ornith., Ecol., Wildl. Mangt., Mamm., Bot., etc.

DR. H(OWE) ELLIOTT McCLURE

Publications

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1962 Epidemiology of the arthropod-borne viral encephalitides in Kern County, California, Univ. of Calif. Public. in Public Health 4: 109-154. (W.C. Reeves, W. McD. Hammon, W.A. Longshore, H.E. McClure, and A.F. Geib).

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1965 Comparison of the periods of residency of some migrant birds common to Japan and Malaya. Misc. Reports Yamashina's Institute for Ornith. and Zool. 4: 149-162, No. 3 and 4.
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1965 Avian bionomics of Malaya 2. The effect of forest destruction upon a local population. Bird Banding 36: 242-269 (H.E. McClure and Hussein bin Othman).

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS,

VS.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANT

AFFIDAVIT OF MAXINE E. McCLOSKEY

District of Columbia) ss.

Maxine E. McCloskey, being duly sworn, states:

1. I am a member of Defenders of Wildlife and its Board of Directors and serve on the Tropical Forests International Committee of Defenders' Board of Directors.

2. I make this affidavit of my own knowledge and, if called to testify, could testify to the matters herein.

3. When I was an instructor in U.S. history and political science at Merritt College, Oakland, California, I learned of the opportunity presented by the Annual National Convention of the American Association for the Advancement of Science to arrange a symposium on en-

dangered species. The convention was held in San Francisco, California in February 1974. The symposium was titled: Symposium on Endangered Species: Causation and Remedies. It featured twenty-four speakers and was held for two days.

4. Because of my interest in endangered species, I was approached by the founder of Project Jonah (a wildlife conservation project) to become a member of its board of directors. I served on the board from 1973-1977, serving as president during 1977.

5. I founded the Whale Center in January, 1978 in Oakland, California, and served as its first president through 1985 and executive director (a paid professional position) through 1984. With this specialized concentration in whales (nine species of great whales are on the U.S. endangered species list and all ten are protected from trade by CITES) I participated in the annual meetings of the International Whaling Commission from 1977 through 1985. For seven of those meetings I served as appointed adviser to the U.S. Commissioner to the whaling commission. I have written extensively on whale conservation matters and have taught courses on conservation policy.

6. In pursuit of my interest in wildlife conservation, I attended three General Assemblies of the International Union for the Conservation of Nature (IUCN). The assemblies were held in Geneva, Switzerland, Christchurch, New Zealand, and Madrid, Spain. During the assembly in Madrid, I was observer for Defenders of Wildlife. I was also invited to prepare a forty-page paper on whale sanctuaries for the Third World Congress on National Parks, sponsored by the IUCN, held in Bali, Indonesia, October, 1982.

7. In 1981 I participated in the Meeting of the Parties of the Convention on International Trade in Endangered Species, held in San Jose, Costa Rica.

8. In 1985 I represented Defenders of Wildlife at the First Meeting of the Parties to the Convention on Migratory Species, held in Bonn, Germany.

9. Some of my travels have included areas of special concern for the welfare and survival of a variety of endangered species. These include visits to Bali, Indonesia in 1982, and to Brazil in 1984. One of my purposes on these trips was to enjoy and study the wildlife or its presence in the areas to the extent possible. I plan to continue my trips to enjoy and study endangered wildlife in foreign countries and their territorial waters.

10. During the trip to Bali I learned about the ongoing U.S.-funded translocation projects that remove vast numbers of the population from the highly conjested islands of Java to outer islands including Irian Jaya. This population removal and transmigration jeopardizes such endangered species as the orangutan and the Sumatran rhinocerous. I also learned more about subsistence hunting of endangered fin whales in Indonesian waters. On visits to various national parks on Bali, I learned about some of the conservation problems of endangered species there and enjoyed seeing their habitat.

11. When in the border area that divides Brazil, Argentina, and Paraguay, I saw the unbelievable Iguazu Falls and Park and learned about the endangered species in the region. I also saw the Itaipu Dam, the largest hydroelectric project in the world, saw the enormous lake that it created, and the effect on the habitat and learned about the endangered and nonendangered species impacted by this massive development. The endangered species whose habitat was flooded by this project include the margay, harpy eagle, jaguar, maned wolf, and howler monkey. (*Defenders* September/October 1983 Issue included the attached) article "Rescue on the Parana" about the effort to collect as many of the animals fleeing the 100-mile flood as possible.)

12. I plan to return to these sites to study and enjoy the endangered species and their habitat there.

13. I will be harmed, in fact, both personally and professionally, and Defenders and its members will be harmed if the habitat of these endangered wildlife, and hence the wildlife themselves, is further degraded or diminished as it is threatened to be by U.S. on-going agency actions and funding for deforestation in the tropical rainforests of Brazil through such projects as the Polonoroeste project. (See Aufderheide and Rich, "Debacle in the Amazon", *Defenders* March/April 1985, p. 20*ff*. attached). We and these species will also be harmed directly by the series of approximately 32 dams in the Amazon River basin being funded by U.S. funds through the World Bank according to the article "World Bank Dam Loans to Spur Amazon Hydro-Development", in *International Dams Newsletter*, September, 1986 (copy attached).

14. Requiring consultation, as Defenders is seeking, between action agencies and the Department of the Interior's Fish and Wildlife Service would help prevent harm to these endangered species and, hence, to me.

/s/ Maxine E. McCloskey
MAXINE E. McCLOSKEY

Subscribed and sworn to before me
this 4th day of November, 1986.

/s/ Roselyn E. Vaccaro
Notary Public
[SEAL]
My Commission Expires Feb. 14, 1990

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS

vs.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANT

AFFIDAVIT OF J. CAMPBELL PLOWDEN

District of Columbia) ss.

J. Campbell Plowden, being duly sworn, states:

1. I have been a staff member of The Humane Society of the United States (HSUS) since January, 1985.

2. I received a B.A. in biology with an emphasis on ecology and environmental studies from the University of Pennsylvania in 1975. Major papers focused on the social ecology of carnivores in the Serengeti ecosystem in Africa and a comparison of avian fauna in a disturbed and undisturbed salt marsh in New Jersey. As a boy I visited the Serengeti ecosystem in Africa and saw leopards, now on the threatened and endangered list. I also traveled in the Yucutan region of Mexico for several weeks in 1974 interviewing persons concerned with the status of felid predators.

3. I worked with the Greenpeace organization from 1977 to 1984 on a variety of wildlife and environmental issues, principally the conservation of the great whales. While serving as National Wildlife Coordinator in 1982 I coordinated the organization's effort for the reauthorization of the Endangered Species Act. Other issues I assisted in were: Canadian harp seal hunt, impact of oil spills on marine wildlife, transportation of spent nuclear fuel, and nuclear reactor safety issues, and destruction of coral reefs. During various Greenpeace campaigns I conducted field investigations and advocacy campaigns in Brazil, Chile, Peru, Taiwan, Korea, the Philippines, and Japan. One purpose of these trips was to study and enjoy the endangered and threatened wildlife in these countries.

4. I joined The Humane Society of the United States in January, 1985 as the Whale Campaign Coordinator. In addition to this work, I have assisted in the organization's campaign on the Pribilof seal hunt and investigated the wild bird trade and conservation of tropical rainforests and their wildlife.

5. In October, 1985, I founded the environmental organization TERRA – Tropical Ecosystem Research and Rescue Alliance – whose principal purpose is to conduct research and advocacy programs to promote the conservation of tropical ecosystems, including their endangered and threatened wildlife, and indigenous peoples living in these species-rich habitats.

6. I make this affidavit of my own knowledge and, if called upon to testify, could testify to the matters herein.

7. I visited Brazil and Peru in 1986 between January and April to gain an overview of the problem of deforestation in the Amazon region and to investigate the exploitation of wildlife for the pet trade and biomedical research. This work was conducted on behalf of The HSUS and TERRA. I interviewed numerous environmental activists,

researchers, and government officials about these issues during this trip. I also visited the Carajas iron ore mine, various sections of the Grande Carajas regional development project, which the World Bank is now contemplating financing, and Balbina hydroelectric dam which has received funds from the World Bank. On that trip I observed several species of caimans which will be affected by the Grande Carajas development project. I also visited several areas of active and abandoned cattle pastures and numerous sawmills in the central Amazon region. I discussed the environmental impact of the Polonoroeste project (another project which received extensive World Bank funding) with officials in Brasilia, Porto Alegre, Belem and Porto Velho. I also visited Rondonia where the Samuel Dam is being built with World Bank funding, further jeopardizing endangered species in the area, including jaguars and other tropical rainforest species.

8. On my 1986 trip to Peru I observed and enjoyed the habitat of the endangered jaguar, Uakari, and Geoldi's marmoset. These species and their habitat will be harmed by the Agency for International Development Picchis-Palcazu project. This is a community forestry project doing innovative work on sustainable forestry. Despite innovation, any sustainable forestry is likely to harm the above mentioned endangered species and others in the areas and therefore should be subject to consultation to avoid or minimize their harm.

9. A purpose of my visit to Brazil and Peru was to study the impact of development projects on endangered wildlife and their habitats. During my visit I observed scarlet macaws, toucans, howler monkeys, reptiles, and a variety of psittacine birds in the wild near Manaus, Brazil. I also observed and enjoyed the habitat of the endangered Brazilian three-toed sloth and giant otter. I camped out at a field station near Paragominas, Brazil and observed

bats, numerous birds, and discussed sightings of endangered jaguar with a local researcher. While visiting a jungle site near the Carajas iron ore mine and other secondary development projects related to Grande Carajas in the states of Para and Maranhao, I witnessed numerous bird species, crocodilians, and heard numerous primates in the forest. I observed sloths near Belem and Manaus. I observed Amazon river dolphins, and numerous bird species during boat trips on the Amazon river. I witnessed numerous bird species including psittacines and toucans, and primate species (including a wild sighting of a saddleback' ed marmoset) in the jungle near Iquitos, Peru.

10. Attached hereto is a copy of the newsletter *Liàna* which gives a summary description of this trip. A report on the bird trade will be forthcoming.

11. I will suffer harm in fact as the result of American aided development (via funds provided to support World Bank projects) in Brazil and the above mentioned Agency for International Development project in Peru, among others. As noted above, I have observed threatened and endangered species there and plan to do so again. I appreciate and enjoy their existence in Brazil and Peru.

12. In the future, I plan to visit Rondonia and Acre-sites of the Polonoroeste and Acre road projects (funded by World Bank and Interamerican Development Bank) to study the environmental impact of these projects on the wildlife of these vital Amazon regions. I also plan to visit parts of the Amazon in Peru where U.S. AID has been active in sponsoring various development projects. I plan to return to the Brazilian Amazon to follow-up on the impact of the development projects already mentioned in this statement. Having witnessed the living jungle and some of its abundant wildlife up close and then observed vast tracts of secondary vegetation and land denuded as a result of destruction of the primary forest, I can easily say I have

already experienced harm through the loss of wildlife in the latter areas. As a rate of deforestation continues to accelerate, I will be harmed, in fact, both personally and professionally, by the continuing ill-planned U.S. aided and funded "development" and the immeasurable loss of wildlife which results.

13. The staff and members of The Humane Society of the United States, including myself, will be harmed, in fact, by the loss of threatened and endangered wildlife resulting from the current lack of consultation under the Endangered Species Act regarding the effects of the above described, and other U.S. agency actions on endangered and threatened species overseas.

14. I have a longstanding interest in the international ramifications of endangered and threatened species protection. It is my opinion that the destruction of tropical rainforests represents the single greatest threat to the plant and animal species on this planet.

/s/ J. Campbell Plowden

J. CAMPBELL PLOWDEN

DISTRICT OF COLUMBIA, SS:

Subscribed and sworn to before me
this 6th day of November, 1986.

/s/ Joan P. Spade

Notary Public

My Commission Expires January 11, 1991

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS

VS.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANT

AFFIDAVIT OF AMY SKILBRED

District of Columbia) ss.

Amy Skilbred, as being duly sworn, states:

1. I am a member in good standing of Defenders of Wildlife and have been a member since October 1985. I am also a member of the staff of Defenders of Wildlife.

2. As a member of Defenders of Wildlife staff I have a professional interest in the protection of endangered species and their habitat.

3. I make this affidavit of my own knowledge and, if called upon to testify, could testify to the matters herein.

4. I have visited the areas in and around Kandy, December 1981 and January 1982 I spent a month back-packing, wildlife viewing, and enjoying many of the unique natural areas of Sri Lanka. I intend to revisit the area in the future for similar uses and purposes.

5.A purpose of my visit was to observe the extraordinary wildlife and habitat of this island country, including its endemic and endangered species such as the Asian elephant and the leopard. Unfortunately, during my visit, I was unable to see any of the endangered species. However, I enjoyed knowing they were there and searching for them. I also observed their habitat and other magnificent wildlife.

6. As a member of Defenders of Wildlife and user of the endangered wildlife of Sri Lanka and its habitat, I have a strong interest in the management and use of their remaining habitat as it is integral to their survival. In particular, I am concerned about the effect on these species of the continuing Mahaweli Project, funded, in part, by the U.S. Agency for International Development. According to research by Edward Goldsmith and Nicholas Hildyard and the Environmental assessment of the project prepared by the agency for International Development, this development project will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited; an action which presents the greatest danger to Sri Lanka's wildlife, especially its endemic species and large mammals such as the leopards and elephants which inhabit the project area. The resulting displaced wildlife has very little area in which to seek refuge and the disruption of important ecosystems may severely shorten the future of these species.

7. I have been informed by John Fitzgerald, Washington Representative, Endangered Wildlife, that the Agency for International Development has refused to request or submit to a formal § 7 Consultation with regard to the Mahaweli project.

8. I will suffer harm in fact as the result of American aided development in Sri Lanka. I intend to return to Sri Lanka in the future and hope to be more fortunate in spot-

ting at least the endangered elephant and leopard. I appreciate their existence in Sri Lanka

9. I have a continuing interest in the fate of endangered and threatened species and their habitat internationally, especially where US-funded development may cause the direct loss of these species or their indirect loss due to habitat destruction.

/s/ Amy Skilbred
AMY SKILBRED

DISTRICT OF COLUMBIA, SS:

Subscribed and sworn to before me
this 4th day of November, 1986.

/s/ Roselyn E. Vaccaro
Notary Public
My Commission Expires Feb. 14, 1991

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS

vs.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANT

AFFIDAVIT OF JUDY M. BELLAIRS

State of Minnesota) ss.
County of Hennepin)

Judy M. Bellairs, being duly sworn, deposes and says as follows:

1. My name is Judy Bellairs and I am Issues Coordinator for Friends of Animals and Their Environment (FATE).

2. FATE is an organization formed for the protection of endangered and threatened species and has been a successful litigant in several cases in the District of Minnesota to protect the threatened Eastern timber wolf.

3. I am a resident of the State of Minnesota and have enjoyed, studied, and observed bald eagles and peregrine falcons in Minnesota. Bald eagles and peregrine falcons

are international species with breeding ranges in Canada and the United States and wintering ranges along the Gulf Coast of the United States and Mexico.

4. I enjoy and study the Eastern timber wolf while in Minnesota. The international range of the Eastern timber wolf includes Canada and portions of Minnesota, Michigan and Wisconsin.

5. I enjoy and observe, while in Minnesota, the following migratory song birds:

Eastern kingbirds; great blue herons;
Scarlet tanager, blue-winged teals;
Tree swallows; Baltimore orioles; and
Purple martins.

These birds' winter ranges are in the Central and South American rain forest.

6. The endangered peregrine falcon winters in the Central and South American rain forests and summers in the Arctic. I have observed peregrines in this state, and enjoy their presence.

7. I understand that United States' funded activities in Southeast Asia and in the Amazon threaten existing populations of, among other species, tapirs, Asian elephants, rhinos, tigers, caimons, and jaguars. The presence of diverse species on this planet is spiritually, morally, and esthetically important to me.

8. These activities also threaten my enjoyment of the species in zoos within the United States. These activities also threaten my future, as I hope to study the animals in their native habitats. The Endangered Species Act makes these animals my heritage, and I hope to visit their habitat in the future to study and enjoy the animals.

Further deponent sayeth not.

/s/ Judy M. Bellairs
JUDY M. BELLAIRS

Subscribed and sworn to before me
this 10th day of November, 1986.

/s/ Lori J. Timm
Notary Public
My Commission Expires Sept. 22, 1988

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS

vs.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANT

AFFIDAVIT OF BRIAN B. O'NEILL

State of Minnesota) ss.
County of Hennepin)

Brian B. O'Neill, being duly sworn, deposes and says as follows:

1. I am a member of the bar of this Court.

2. I have been lead attorney on the following environmental matters:

Year	Description
1978	Fund for Animals v. Andrus, 11 Env't. Rep. Cas. (BNR) at 2189 (D. Minn. 1978) (a civil action dealing with wolf predator control tried before Magistrate McNulty in Duluth).

Year	Description
1979-81	Minnesota v. Bergland and the Sierra Club, 499 F. Supp. 1223 (D. Minn. 1980), *affd.*, 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1981) (a fight over the constitutionality of the 1978 BWCAW Act).
1981	Environmental Quality Board Proceedings on Black Bear Management in Minnesota.
1983-84	Hermann v. Barnes and the Sierra Club, C3-81-1184, a civil action in Chisago County, Minnesota, and the Minnesota Supreme Court (dealing with the liability of property owners for the unencouraged acts of wild animals (in this case beavers)).
1983-84	Friends of Animals and Their Environment v. Nichols, C9-84-40, a civil action in Hennepin County, and the Minnesota appellate courts (an action to force the promulgation of regulations for fur farming).
1984-85	Sierra Club and Defenders of Wildlife v. Clark, 755 F.2d 608 (8th Cir. 1985) (the Minnesota wolf case).
1985	Voyageurs National Park Association v. Arnett, 609 F. Supp. 532 (D. Minn. 1985) (the Black Bay trapping case).
1985	Defenders of Wildlife and Sierra Club v. Hodel, Civ. No. 3-85-1236 (D. Minn. 1985) and related state court actions (the mosquito litigation).
1985	Grand Portage Band v. Minnesota, Civ. 4-85-1090 (D. Minn. 1985) (Indian treaty rights to snowmobile in the BWCAW).
1985	Administrative proceedings with the Fish and Wildlife Service over grizzly bear management in the northern Rockies.

Year	Description
1985	Washington, D.C. lobbying and testimony before Congressional committees on Endangered Species Act reauthorization.
1985-86	Mountain States Legal Foundation v. Clark and the Sierra Club, Civ. 94-1485 (10th Cir. 1986) (dealing with federal regulations of wild horses and burros on the western ranges).
1986	Defenders of Wildlife and the Sierra Club v. Administrator, EPA, Civ. 4-85-687 (a suit to cancel strychnine registrations nationally because of effects on eagles).
1986	Superior National Forest Plan appeal.

/s/ Brian B. O'Neill
BRIAN B. O'NEILL

Subscribed and sworn to before me
this 10th day of November, 1986.

/s/ Lori J. Timm
Notary Public
My Commission Expires Sept. 22, 1988

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS

vs.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANT

AFFIDAVIT OF STEVEN C. SCHROER

State of Minnesota)
) ss.
County of Hennepin)

Steven C. Schroer, being duly sworn, deposes and says:

1. I am an attorney and a member of Faegre & Benson, counsel for plaintiffs in the captioned action. I submit this Affidavit in opposition to the Government's frivolous motion to dismiss this action for an alleged lack of standing or an alleged lack of requisite "adverseness" resulting in an actual case or controversy within the meaning of the United States Constitution.

2. I received my Juris Doctor degree in 1974 from Columbia University in New York City, where I was a member of the Law Review. Thereafter, I served as law

clerk to the Honorable Murray I. Gurfein, Judge of the United States Court of Appeals for the Second Circuit. I commenced my career as a private practitioner with the law firm of Cravath, Swaine & Moore in New York City in 1975.

3. In 1977, I left my position in New York to pursue post-graduate legal studies at the University of Cambridge, England. My studies focused in the area of International Law. I was awarded a Master of Law degree (LL.M.) from the University of Cambridge in International Law. My masters thesis, which is permanently archived in the University of Cambridge Library, dealt with international law regarding anadromous fish species.

4. Upon completing my post-graduate studies in Cambridge, I returned to the United States and in 1978 joined the firm of Faegre & Benson, counsel for plaintiffs in this action. I have been a partner of Faegre & Benson since January 1, 1983, and my specialty since then has been commercial litigation.

5. I have substantial litigation experience in both state and federal courts. I am admitted to practice before the state courts in Minnesota and in New York, the United States District Courts for the Districts of Minnesota and New York, the United States Courts of Appeals for the Seventh and Eighth Circuits, and the United States Supreme Court. I have also appeared as counsel *pro haec vice* in federal court cases litigated in the United States District Courts for the Central District of California, the District of Colorado, the Southern District of Texas, the Western District of Wisconsin, and others.

6. In addition to my training and experience in international law and federal litigation, I have maintained an active interest, both personally and professionally, in environmental and conservation matters. I have acted as associate counsel in several significant environmental

cases litigated before this court, including *Sierra Club v. Clark*, 755 F.2d 608 (8th Cir. 1985) (the Minnesota wolf case).

7. In addition to my professional activities, I am an avid outdoorsmen and conservationist, and have a special interest in sport fishing. I have fished for migratory saltwater species of fish in the territorial waters of Canada, Mexico, Grand Cayman, and the United States. I have fished for anadromous species, such as the salmon and the steelhead, within the national waters of England, Scotland, and the United States. I have also fished for other fresh water fish in the international boundry waters of Canada and the United States.

8. It has been, and I hope will continue to be, a great source and esthetic pleasure for me to pursue my sport fishing activities as described above. In this respect, it is of great personal concern to me that the agencies of the United States Government observe their obligations under the Endangered Species Act and other environmental laws in order to protect my own interest in personally enjoying endangered or potentially endangered fish and other animals both in the United States as well as in other nations.

9. My interest in international fresh water fishing is perhaps best illustrated by the fact that I am a member of several conversation organizations which promote the environment of salmon and steelhead, anadromous species which migrate in and out of territorial and international waters. I am a member of the Atlantic Salmon Foundation, Trout Unlimited, The Federation of Fly Fisherman, and the Catskill Fly Fishing Center. The Atlantic Salmon Foundation, in particular, is extremely active in promoting environmental laws, regulations, treaties, and other private and public international agreements, and also sponsors research to encourage international protection of dwindling salmon fisheries.

10. A simple example of how actions of United States agencies in foreign countries could adversely affect my interests and rights arising under the Endangered Species Act lies in the damming of rivers. As the United States Supreme Court has recognized, the damming of a river may so adversely effect the environment of endangered fishes so as to make such damming improper under the Endangered Species Act. See *Tennessee Valley Authority v. Hill*, 431 U.S. 153 (1978).

11. For an example of how this could operate on an international level, the erection of a dam on the upper stretches of the Kettle or Okanogan tributaries of the Columbia River in British Columbia, as well as the maintenance of such a dam after its erection, could have substantial adverse impact on spawning grounds of certain species of Pacific chum salmon. Such species contribute to the sport fishery in the Columbia River system within the United States in the States of Washington and Oregon, as well as within the territorial Pacific waters of the United States, where salmon migrate after leaving their spawning grounds in Canada.

12. Similarily, the Skagit River, a fine sport river for several species of Pacific salmon, rises in British Columbia and flows through Washington State. Damming of the Skagit in British Columbia—which has been a subject of debate for many years—could destroy spawning runs of dwindling salmon species.

13. If a dam project on the upper Columbia or the Skagit within Canadian territory and cooperation or financial assistance from American authorities were requested, I would be horrified if the affected United States agency would not consult the Fish and Wildlife Service with respect to whether such a project might threaten fish species such as the various types of Pacific salmon which may use the upper reaches of these rivers for their spawn-

ing grounds. The regulations at issue would, in my opinion, illegally prohibit such consultation. I have a substantial interest, both personally and professionally, in challenging these illegal regulations in court.

Dated: November 10, 1986.

/s/ Steven C. Scrhoer
STEVEN C. SCROER

Subscribed and sworn to before me
this 10th day of November, 1986.

/s/ Cynthia R. Nelson
Notary Public
My Commission Expires April 13, 1991

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS

vs.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANT

AFFIDAVIT OF NORMAN COHEN

I, Norman Cohen, am the Environmental Coordinator in the Office of the Administrator of the Agency for International Development. I am responsible for monitoring A.I.D. projects with important environmental consequences and facilitating discussions about those projects with private environmental groups, other government agencies and the Congress.

Because this lawsuit concerns international environmental matters, I have been following its development, reading the parties' pleadings, and reviewing Agency records pertaining to protection of endangered species.

On pages 9 and 10 of the plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, the plaintiffs set forth a list of projects that they have visited and assert will harm endangered species. Of the eight projects listed, only two—the

Mahaweli Project and Pichis-Palcazu—include some A.I.D. funding. A.I.D.'s involvement in both projects demonstrates that A.I.D. has been and is extremely sensitive to the environmental impacts of its projects, including their effect on endangered species.

The Mahaweli River Basin Project in Sri Lanka involves thirteen donors plus the Government of Sri Lanka and a cost of approximately $2.3 billion. A.I.D. loans and grants for the project total approximately $170 million.

A.I.D. funded preparation of an Environmental Assessment for the entire project, in accordance with A.I.D. environmental regulations. That assessment showed that the project could affect several endangered species. Accordingly, A.I.D. worked with the Government of Sri Lanka to establish four new nature reserves and associated infrastructure and training programs within the project area. In June 1984, the Administrator of A.I.D. received a letter of appreciation from the World Wildlife Fund for helping to promote environmental protection programs in Sri Lanka such as the Mahaweli nature reserves.

The Pichis-Palcazu forestry project in Peru was designed, in part, to maintain the natural rain forest and its flora and fauna (including endangered species). The Government of Peru had originally proposed opening huge tracts of forest in eastern Peru for colonization and intensive development. Such colonization would have effectively wiped out the natural habitats of many local species. A.I.D. environmental and project officers conducted an environmental assessment according to A.I.D. environmental regulations and convinced the Peruvians that no further colonists should settle in the valley and redesigned the project accordingly. The assessment included several technical reports on the projects' impact on local flora and fauna that were carefully considered by A.I.D. and the Government of Peru when redesigning the project.

I declare under penalty of perjury, pursuant to 28 U.S.C. §1746(2), that the foregoing is true and correct to the best of my knowledge and belief.

Respectfully submitted,

/s/ Norman Cohen

NORMAN COHEN

11-19-86

Date

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
722 JACKSON PLACE, N.W.
WASHINGTON, D.C. 20006

JANUARY 5, 1977

Dear Mr. Schreiner:

The Council on Environmental Quality was pleased to review the proposed notice and "Proposed Regulations to Assist the Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973" transmitted to us by Director Greenwalt's letter of November 11, 1976. These proposed regulations are an important step forward in protecting endangered species and should assist agencies in their consultations with the Service under the Act. In particular, the Council commends the Service for proposing procedures which provide for the application of section 7 to federal activities and programs beyond the geographical jurisdiction of the United States and for its efforts to coordinate its proposed consultation process with established procedures under other statutes. We do, however, have several recommendations concerning the proposed regulations.

One of the crucial issues not adequately addressed in the regulations is the extent to which federal agencies should consult with the Secretary under Section 7. Proposed section 17.93(a)(3) provides that each agency should make an initial threshhold determination as to whether or not an activity or program "may affect listed species or their habitats." If so, the proposed section provides that consultation "should" occur. Left unclear are what criteria should be used by agencies in making this determination, when that determination should be made and whether a consultation request is mandatory or discretionary. Similar uncertainty is found in section 17.93(a)(4) which

provides that the Secretary will request initiation of consultation if he identifies an activity or program that "may affect listed species or their habitat." We recommend that the regulations define "habitat" and specify criteria to be used in determining whether or not an activity or program "may affect listed species or their habitat." We also recommend that the regulations provide that agencies make their threshold determination as early as possible in their planning process and refrain from undertaking any activities or programs subject to the proposed consultation procedure until consultation is complete.

Section 17.93(d) provides that the Secretary will make a threshold determination upon receipt of a request for consultation. It is not clear, however, what criteria should be used by the Secretary to determine whether or not an activity or program "is likely to promote the conservation of listed species" under section 17.93(d)(1) or "is not specifically for the conservation of listed species" under section 17.93(d)(2). The first of these two standards appears to focus on the effect of an action while the other appears to focus on the intent behind the action. These standards should be clarified and criteria for their implementation should be specified.

Criteria should also be specified for the Secretary's determination under section 17.93(d) that an activity "may jeopardize" a species, or result in the "destruction or adverse modification" of its critical habitat. In this regard, it should be noted that since section 7 refers to "modification" of habitat and not "adverse modification" it is unclear that the insertion of the term "adverse" is proper.

Section 17.93(d) does not specify a time period for the Secretary's response to an agency's initial notice of an activity or program. Similarly, no time period is specified for the issuance of biological opinions under section 17.93(e).

If an activity or program would "jeopardize" a species or potentially destroy its critical habitat the Agency should prepare and consider an environmental impact statement for the activity or program. We recommend, therefore, that a maximum time period consistent with existing procedures under the National Environmental Policy Act be specified for the Secretary's response under 17.93(d), and issuance of biological opinions under section 17.93(e). This will promote timely decisions, help reduce paper work and insure compliance with section 17.93(e)(4) which provides that the opinion and any recommendation of the Service will be included in the final documents prepared under the National Environmental Policy Act.

We strongly agree that Section 7 applies beyond the geographical jurisdiction of the United States. We question, however, whether the failure to apply those provisions of Section 7 concerning destruction or modification of critical habitat is consistent with the purposes and policies of the Act, and with the need for a comprehensive and effective international program to restore and protect endangered and threatened species.

We appreciate the opportunity to comment on these proposed regulations.

Sincerely,

Lee M. Talbot
Assistant to the Chairman
for International and
Scientific Affairs

Mr. Keith M. Schreiner
Associate Director, Federal Assistance
Fish and Wildlife Service
United States Department of Interior
Washington, D.C. 20240

REGUTTING: mgw 12/27/76

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JUNE 30, 1978

Honorable Robert C. Brewster
Acting Assistant Secretary of State
Bureau of Oceans and International Environmental and Scientific Affairs
Department of State
Washington, D.C. 20520

Dear Ambassador Brewster:

Thank you for the letter of April 28, 1978 from Assistant Secretary Mink expressing the Department of State's views on the United States Fish and Wildlife Service's final regulations implementing Section 7 of the Endangered Species Act of 1973. Your letter voiced a number of concerns over the extraterritorial application of those regulations to Federal agency activities in foreign countries. With all due respect, I must object to your analysis on this issue and reject your contention that consultation under Section 7 be made discretionary for Federal agencies.

Because of the importance of this matter and the number of areas of disagreement, I will respond to the April 28th letter at some length.

I was initially struck by the inconsistency of the State Department's position on its willingness to consult under Section 7. The letter indicated that the State Department "was anxious to fulfill" its obligation to consult under Section 7 in order to avoid jeopardizing a listed species' continued existence or modifying or destroying its critical habitat. However, you then went on to object to the scope of the Section 7 regulations and their extraterritorial application. Assuming *arguendo* that your objections on extraterritoriality are correct and that Section 7 is limited to Federal activities within the United States, I am at a loss to

determine what consultation obligations would remain for your Department to "anxiously fulfill". Adoption of your interpretation on extraterritoriality would quite obviously excuse you from compliance with the provisions of Section 7. Such a blanket exemption is simply not warranted under the Act.

Your constricted interpretation of agency obligations under Section 7 is equally troubling. The Department of the Interior contends that Section 7 imposes a number of independent burdens upon the agencies of the Federal government. First, the Section directs the Federal agencies to utilize their authorities in furtherance of the purposes of the Act. Second, it imposes a *mandatory* procedural requirement for consultation with the Fish and Wildlife Service or the National Marine Fisheries Service. The rationale for making consultation manditory was discussed at length in the preamble to the final Section 7 regulations, 43 Fed. Reg. 870, 871, and we commend it to your attention. Section 7's third obligation is its direction that *all* Federal agencies insure that the activities that they authorize, fund or carry out do not jeopardize the continued existence of a listed species *or* adversely modify or destroy its critical habitat.

The Fish and Wildlife Service has consistently interpreted these two latter obligations as separate and distinct. Thus, a Federal agency could jeopardize the continued existence of a listed species without any impact upon critical habitat. Such was the case in *Defenders of Wildlife v. Andrus*, 428 F. Supp. 167 (D.D.C. 1977), where attention was focused on the potential for "jeopardy" arising out of the Fish and Wildlife Service's early morning shooting hours for migratory birds. The Court was concerned that reduced light might result in misidentification and shooting of listed species, jeopardizing their continued existence. The impact of those shooting hours upon critical

habitat was never an issue in the case; there was no logical connection between species misidentification and habitat destruction. This case highlights the tenuousness of your position that Section 7's two prohibitions are not severable. The concept of "jeopardy" as defined in the final Section 7 regulations, 43 Fed. Reg. 870, 875 is not limited to matters affecting the habitat of a species and thus is more sweeping in its application than Section 7's admonition concerning critical habitat.

The severable character of these two prohibitions is even more evident when one reflects upon the fact that over 90 resident species of fish or wildlife had been listed as endangered under the two earlier Endangered Species Acts. Subsequently, these species were automatically transferred over as endangered under the 1973 Act. The concept of critical habitat first appeared in the 1973 Act and had not been designated for any of these automatically listed resident species. There is not a shred of evidence in Section 7's legislative history to indicate that Congress granted Federal agencies authority to jeopardize the continued existence of these resident species until the time-consuming process for critical habitat determinations had been completed. Critical habitat for the whooping crane wasn't designated until May of this year. Yet certainly prior to that time, no court would have allowed a Federal agency to jeopardize the continued existence of the whooping crane, the best known endangered species in this country.

As a corollary to this, the Service rejects the contention that consultation under Section 7 and compliance with the "jeopardy" prohibition is impossible, absent a determination of critical habitat. A critical habitat determination is merely an expression in cartographic fashion of existing knowledge on the crucial biological needs of a particular species. The absence of such a map, however, is not to be

equated with the absence of biological information. The consultation process under Section 7 was specifically designed to accomplish the informational "fine tuning" necessitated by the absence of a critical habitat determination. In fact, the vast majority of Section 7 consultations to date have involved species for which critical habitat has not been designated.

In summary, the Fish and Wildlife Service contends that Section 7's prohibitions against "jeopardy" and critical habitat modification or destruction are independent and severally enforceable. Similarly, it is the position of the Service that consultation is mandatory on the issue of "jeopardy," even when critical habitat has not been designated for a particular species.

In light of the above, and in recognition of the legislative history of the Act, the Service has concluded that while the legislative history of the Act supports the application of Section 7's prohibition against "jeopardy" extraterritorially, the Secretary's power to determine critical habitat does not extend to foreign countries. It follows that with critical habitat designations limited to the United States, Section 7's prohibition against its modification or destruction affords no means for extraterritorial application.

While we agree with your recitation of the statutory rule of interpretation on the extraterritorial application of statutes, we disagree with your conclusion that nothing in the legislative history of the Endangered Species Act supports the extraterritorial application of at least part of Section 7.

The Endangered Species Act was premised upon the recognition that the earth's populations of fish and wildlife are international resources requiring multilateral cooperation for their preservation. Since the abandonment of the parochial "native species only" approach of

the first Endangered Species Act, Pub. L. No. 89-669, 80 Stat. 926, the endangered species legislation of this country consistently has reflected an active Congressional concern for conserving fish and wildlife on a world-wide basis. In the opening policy section of the Endangered Species Act of 1973, Congress reaffirmed this international commitment by citing a long list of international conservation treaties and agreements that the Act was designed to support. 16 U.S.C. § 1531.

The jeopardy prohibition of Section 7 is equally sweeping in its intentions; that Section having been construed by the Supreme Court last week as being without limitation in its application. *TVA v. Hill*, No. 76-1701, slip op. at 18, (Sup. Ct., June 15, 1978). By its terms, the jeopardy clause applies to all Federal agencies. There is no exception for agencies involved in foreign countries. Also by its terms, the jeopardy clause applies to all species listed under the Act. There is no exception for foreign species, and most of the animals listed as endangered or threatened are in fact foreign animals. 50 C.F.R. § 17.11. Congress would not have made the jeopardy clause applicable to foreign species if it did not intend the clause to apply to activities taking place in the countries where such species are found.

The Act's legislative history confirms this analysis. Admittedly, the history dealing solely with Section 7 says nothing specifically about its applicability overseas. But Section 7 cannot be isolated from the remainder of the Act. In construing the jeopardy clause, the history of the entire statute must be examined. During the debates leading up to passage, Congressman Dingell, Chairman of the House Subcommittee on Fisheries and Wildlife Conservation and the Environment, made the following observation:

> The purposes of the bill include the conservation of the species and of the ecosystems upon which they de-

pend, and *every* agency of Government is committed to see that those purposes are carried out. It is a pity that we must wait until a species is faced with extermination before we begin to do those things that we should have done much earlier but at least when and if that unfortunate stage is reached, the agencies of Government can no longer plead that they can do nothing about it. They can, and they *must*. The law is clear. 119 Cong. Rec. 42913 (1973) (emphasis added).

In addition, during the House hearings, of which he was Chairman, Congressman Dingell made this statement:

> The point I want you to comearound to understand is that this country wants a management program that is going to maintain these populations *around the world*. Hearings on Endangered Species [H.R. 37 and Others] Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 93rd Cong., 1st Sess. 349 (1973) (emphasis added).

Thus, the legislative history for the Act as a whole shows that the statute is aimed at protecting both domestic and foreign species, and that every federal agency is committed to that aim. In light of that purpose, an argument that the jeopardy clause is not applicable to foreign activities is devoid of support.

It could be argued that the Act's concern for foreign wildlife is limited to the international cooperation provided in Section 8. 16 U.S.C. § 1537. Clearly, Section 8 does afford protection to foreign species through international programs, financial aid, and technical assistance, but that Section is by no means the only provision of the Act protecting foreign species. Section 9, 16 U.S.C. § 1538, con-

tains the most significant protections for foreign species, yet operates independently from the international cooperation provisions of Section 8. Among other things, Section 9 prohibits foreign endangered species from being imported, transported or sold in foreign commerce. Section 9 is applicable to any "person" subject to the jurisdiction of the United States, and "person" includes departments or instrumentalities of the Federal Government. 16 U.S.C. § 1532(8). Moreover, Subsection 9(g) makes it a separate offense to cause or solicit any activity prohibited elsewhere in the section. Violations of Section 9 invoke the penalties of Section 11, 16 U.S.C. § 1540, including substantial civil penalties, fines and imprisonment. The prohibitions of Section 9 support the conclusion that the jeopardy clause of Section 7 applies to Federal activities abroad.

It has also been suggested that the application of the jeopardy clause to overseas activities of Federal agencies would infringe upon the sovereignty of foreign countries by imposing on them the environmental policies of the United States. This argument is not convincing. The protection of foreign species under the jeopardy prohibition is certainly no greater an "infringement" of foreign sovereignty than is the actual listing of those species as endangered or threatened. Section 9's prohibitions on foreign commerce are further examples of "infringements" on sovereignty that Congress felt comfortable in making. Since the Act abounds with such examples, it makes no sense to single out Section 7 for stricter scrutiny. It should also be remembered that Section 7's jeopardy clause directly applies to the activities of Federal agencies, not foreign governments. It is clearly within the power of Congress to impose restrictions upon the implementation of Federal agency programs. Realistically, environmental restrictions on agencies of the U.S. are less an intrusion

into the prerogatives of foreign states than are restrictions on application of foreign aid or conditions on the sale of military hardware.

Other environmental statutes having far less express foreign concern than the Act have been held by the courts to apply extraterritorially. In *Environmental Defense Fund v. Agency for International Development*, Civ. Action No. 75-0500 (D.D.C. 1975), a stipulated settlement approved by the court stated that the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4231 *et seq.*, [hereinafter "NEPA"] applied to an international pest management program sponsored by A.I.D. As a result of *Environmental Defense Fund, supra*, A.I.D. also adopted NEPA regulations for its other international programs. 41 Fed. Reg. 26913, 22 C.F.R. Part 216 (1976). In *Sierra Club v. Coleman*, 405 F. Supp. 53 (D.D.C. 1975), 421 F. Supp. 63 (D.D.C. 1976), NEPA was likewise held to apply to the Federal Highway Administration's construction of the Pan American Highway between Panama and Columbia. And in *Wilderness Society v. Morton*, 463 F. 2nd 1261 (D.C. Cir. 1972), the Court of Appeals for the District of Columbia granted standing to Canadian environmentalists opposed to alternative Canadian routes for the Trans Alaskan oil pipeline. The Court concluded that their concern over the environmental impacts within Canada was within the zone of interest protected by NEPA. It follows that if NEPA is capable of extraterritorial application, so to is the jeopardy prohibition of Section 7, for NEPA has been held to be a reflection of the pervading spirit behind the Endangered Species Act. *Hill, et al. v. TVA*, 549 F.2nd 1064, 1072 (6th Cir. 1977).

I also believe that your Department's concerns over the pace of the consultation process are unfounded. The 60 day turnaround in the final Section 7 regulations is the *maximum* time allotment for consultation; the vast ma-

jority of such consultations have taken considerably less time. Furthermore, the Fish and Wildlife Service is capable of shifting its consultatioin personnel in response to situations requiring expedited decision-making. Thus, in a recent consultation over off-shore oil leasing, the Service was able to conduct the consultation process from start to finish in a couple of days. I am confident that special arrangements can be worked out with the Service in order to accommodate the needs of the State Department for expeditious consultation.

For the reasons stated above, we have concluded that the jeopardy clause of Section 7 is applicable to Federal activities affecting listed species in foreign countries and that consultation on such matters can be successfully concluded. It has been previously noted, however, that the Secretary is not authorized to designate critical habitat overseas. Though nothing in Section 7 *explicitly* excludes the designation of critical habitat in foreign countries, the Department has nevertheless concluded that such an exclusion is properly implied. Section 7 requires that the Secretary, prior to his designation of critical habitat, consult as appropriate with the affected *state* governments. Absent from this section is any requirement of consultation with *foreign* governments which might be affected. Because it is illogical to assume that Congress intended any of the states to be consulted before *foreign* critical habitat is designated, this omission would appear to indicate that Congress had no intention of expanding the concept of critical habitat into the international sphere. Congress obviously felt that the designation of critical habitat within the United States was a sensitive enough activity to require input from the affected state governments.

It seems inconceivable that Congress (had it intended that the Secretary also have the duty to designate critical

habitat in foreign countries) could have concluded that input of a similar nature from the Department of State or the affected foreign nation was unnecessary or undesirable. It is more reasonable to conclude that the Secretary was not intended to become involved in foreign designations.

It is my hope that this somewhat lengthy discussion of Section 7's extraterritorial application will clear up any misunderstandings between our two Departments over this issue. Consultation need not be a burden to Federal agencies if a spirit of cooperation is developed and maintained. I am confident that the Fish and Wildlife Service will make every effort to accommodate the special needs of the State Department. Although it is clear that our legal interpretations of Section 7 differ considerably, it is our hope that the Department of State and the Department of the Interior can cooperate in working out a mutually agreeable process by which both Departments can meet their responsibilities in the spirit of the Act.

I wholeheartedly support your suggestion for an informal meeting between our respective staffs to resolve this matter. I have been informed that 2 p.m. on Mondy, July 10th, would be a convenient time for all parties to meet at the Department of the Interior. Mr. Keith Schreiner, Associate Director for the Fish and Wildlife Service, will take care of the necessary arrangements and will notify you of the location of the meeting. Mr. Schreiner can be reached at 343-4646 if you have any further questions.

Sincerely,

/s/ (Sgd) Bob Herbst

BOB HERBST
Assistant Secretary
Fish and Wildlife and Parks

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

FEB 13, 1976

Memorandum

To Associate Director, Federal Assistance Fish and Wildlife Service

From: Assistant Solicitor, Fish and Wildlife

Subject: Designation of Critical Habitat for Foreign Species

We have reviewed the letter from the Natural Resources Defense Council, Inc. (NRDC), which was transmitted to us with your memorandum dated November 29, 1975. In that letter NRDC asserts that the regulations implementing section 7 of the Endangered Species Act of 1973, 16 U.S.C. § 1536, must designate critical habitat for foreign species. Their position is quite simply that because the critical habitat clause of section 7 is not specifically limited to domestic critical habitat it must include habitats for both foreign and domestic species. Our conclusion is that the Secretary is not mandated by section 7 of the Endangered Species Act to designate critical habitat for foreign species. The considerations discussed below convincingly demonstrate that Congress did not intend the critical habitat concept of section 7 to reach to the extent advocated by the NRDC.

The pertinent part of section 7 reads:

> All other Federal departments and agencies shall utilize their authorities in furtherance of the purposes of this Act . . . by taking such action necessary to in-

> sure that actions authorized, funded or carried out by them do not . . . result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

Though nothing in this statute explicitly excludes the designation of critical habitat in foreign countries, this exclusion is there implicitly. A careful reading of both the Act and its legislative history verify this conclusion.

First, section 7 requires that the Secretary, prior to his designation of critical habitat, consult as appropriate, with the affected *state* governments. Absent from this section is any requirement of consultation with *foreign* governments which might be affected. Because it is illogical to assume that Congress intended any of the states be consulted before foreign critical habitat is designated, this omission would appear to indicate that Congress had no intention of expanding the concept of critical habitat into the international sphere. Congress obviously felt that designation of critical habitat within the United States was a sensitive enough activity to require input from the affected state government. It seems inconceivable that Congress (had it intended that the Secretary also have the duty to designate in foreign countries) could have concluded that input of a similar nature from the Department of State or the affected foreign nation was unnecessary or undesirable. It is more reasonable to conclude that the Secretary was not intended to become involved in the foreign sphere.

This conclusion comes into clearer focus when section 7 is contrasted with those sections of the Act which explicitly deal with the relations between the United States and foreign governments under the Act. In section 4(b)(1), which deals with the listing of species, it is provided that

the Secretary shall consult, as appropriate, not ony with the affected states, but also, in cooperation with the Secretary of State, with the country or countries in which the species concerned is normally found. Clearly Congress knew how to provide for international consultation and communication when it intended the Act's policies to have an international impact.

Further evidence of this is found in section 8, which is entitled "International Cooperation," and contains a series of provisions specifically designed to implement the policies of the Act on a worldwide basis. Each such section is qualified by requirements of either consultation with, or, the consent of, the affected foreign government before the provisions of the subsection operate. Section 8(a), while authorizing the President to use certain funds to provide assistance to foreign countries in the development and management of programs designed to conserve endangered or threatened species, explicitly conditions such expenditure on the consent of the country in question. In section 8(d) the Secretary is mandated to encourage foreign states to engage in programs which further the policies expressed in the Act, as long as this encouragement is coordinated with the Secretary of State. In the other subsections of section 8 similar provisions are made for coordination through diplomatic channels before any of the activities under section 8 is authorized. This sharp contrast with the silence on international relations in section 7 is a clear indication that Congress did not intend the critical habitat provisions of section 7 to extend into the international sphere.

The legislative history, while containing little discussion of the concept of critical habitat, offers additional support for this position. In House Report No. 93-412, 93rd Cong., 1st Sess. (1973), the discussion of section 7(a)

which is identical to the present section 7, indicates it was intended that:

> . . . those agencies take the necessary action that will not jeopardize the continuing existence of endangered species or result in the destruction of critical habitat of those species. *To the extent that those actions involve the protection of habitat, the states must be consulted.* (Emphasis added.) House Report, *supra* at p. 14.

This quotation lends further credence to the limited reading we are giving section 7. The House Report in this sentence limits the Secretary's duty to one of consultation with the *states*. Additionally, it indicates that such consultation is to occur whenever the Secretary designates critical habitat. It is only fair to conclude that Congress intended such designation to be confined to the states, as defined by the Act.

The contrast between the obvious omission of any reference to international relations in section 7 and the careful inclusion of such concerns in other sections of the Act is also paralleled in the legislative history. For example, the House Report states that section 4:

> . . . requires the Secretary to make determinations of endangered status on the basis of the best available evidence after consultation with individuals, organizations, states or foreign countries as appropriate. House Report, *supra* at p. 11.

It is also noteworthy that whenever the international impact of the Act (apart from listing) was discussed in either the reports from the committees or in the debates the references were to section 8. See e.g., House Report, *supra* at p. 2; Conference Committee Report, H.R. Rep. No. 93-740, 93rd Cong., 1st Sess. 26 (1973); 119 Cong. Rec.

25670 (remarks of Senator Tunney); 119 Cong. Rec. 25676 (remarks of Senator Williams).

The preceding discussion is premised upon the conclusion that designation of foreign critical habitats could be an internationally sensitive issue and that this likelihood was perceived by Congress. That conclusion does not seem forced. By restricting the manner in which, for instance, foreign aid funds might be spent, we are imposing a sort of land use planning policy on the foreign nation. While it may be true that many strings are attached to our grants of foreign aid, it is almost certainly true that these programs are coordinated through the State Department. It may seem to a sovereign foreign government rather an invasion of its sovereignty to have the Secretary, without prior consultation and without going through "proper" diplomatic channels, impose upon that foreign government the environmental policies and ideological orientations of this country. Congress demonstrated that it was aware of the sensitivities of foreign sovereignties by providing in section 8 for the use of diplomatic channels when international cooperation seemed desirable.

Judging from the close scrutiny received by this bill in Congress, it is unlikely that the marked difference between section 7 and sections 4 and 3 was accidental. Rather, it is fair to conclude that the absence of any reference to international application of critical habitat in section 7's terms and legislative history is a strong indication that there was no Congressional intent to extend the designation of critical habitat to foreign soil.

Finally, in order to make critical habitat a workable concept it is necessary to operate within specific guidelines. The purpose of the notion of critical habitat is to maintain the viability of an endangered species through the preservation of a land base critically necessary to its continued existence. The application of this notion to the

activities of the Federal Government will require that agencies have advance notice of those areas which have been designated critical habitat, so that in their planning process they can take the prohibitions of section 7 into consideration. Any designation of critical habitat, in order to perform this notice function, will require rather specific land designations. But, nearly insurmountable difficulties arise in obtaining the necessary land descriptions in foreign countries into which access is restricted. Compliance with section 7 either becomes impossible or evolves into an *ex post facto* imposition of sanctions on Federal agencies who had inadequate information as to their likely encroachment on critical habitat.

In these situations the interpretation suggested by NRDC leads to unworkable and unreasonable results. Congress is presumed not to have intended such an interpretation and the statute should be given a construction which avoids such results. A preferable interpretation is that the power to designate critical habitat does not extend to foreign soil.

Concluding that section 7 does not mandate the Secretary to designate critical habitat for foreign species does not, however, absolve Federal departments and agencies from full compliance with all the other requirements of section 7. Neither the legislative history nor the administration realities compel that conclusion. No indication is given in any quarter that Congress intended to excuse agency consideration of the jeopardy resulting from its foreign activities to a listed species' continued existence. Thus, Federal agencies and departments are still required to take "such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species . . . ." Because all Federal agencies must operate under these strict restraints, no violence is

done to the protection afforded by the Act by limiting the designation of critical habitat to areas within the states, as that term is defined by the Act.

/s/ (SGD.) RONALD E. LAMBERTSON
Ronald E. Lambertson

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

12 APR. 1977

Memorandum

To: Director, Fish and Wildlife Service

From: Associate Solicitor, Conservation and Wildlife

Subject: Federal Activities Jeopardizing Foreign Species

On April 22, 1976, the Service issued "Guidelines to Assist the Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973" [hereinafter "Guidelines" and "Act"]. Section I.A.2 of the Guidelines took the position that under section 7 of the Act, 16 U.S.C. § 1536, federal agencies were required to insure that their actions in foreign countries did not jeopardize the continued existence of endangered or threatened species. Guidelines, p. 3. The Service's proposed regulations on interagency cooperation also take the position that the jeopardy clause of section 7 applies to foreign activities of federal agencies. 42 Fed. Reg. 4868, 4871 (Jan. 26, 1977). Other agencies have challenged the Service's position on the scope of the jeopardy clause and have contended that it does not apply to federal activities abroad. However, for the reasons following, we believe the Service's position is correct and conclude that the jeopardy clause applies to federal activities in foreign countries.

In an earlier opinion dated February 13, 1976, we concluded that section 7 did not mandate the Secretary to designate critical habitat areas in foreign countries. However, that opinion was based on the critical habitat clause

of section 7 and did not analyze the jeopardy clause. Because analysis of the two clauses leads to different conclusions, the two opinions must be read together.

The jeopardy clause of section 7 reads as follows:

> All . . . federal departments and agencies shall . . . utilize their authorities in furtherance of the purposes of [the Act] . . . by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of . . . endangered species and threatened species . . . 16 U.S.C. § 1536.

As a general rule, congressional statutes are construed not to apply outside the territorial jurisdiction of the United States unless an extraterritorial intent is clearly indicated. *Foley Bros. v. Filardo,* 336 U.S. 281 (1949). An extraterritorial intent is clearly indicated for the jeopardy clause of section 7, however, by the language of the section, the wording of other portions of the Act, and the Act's legislative history.

By its terms the jeopardy clause applies to "[a]ll" federal agencies. There is no exception for agencies involved in foreign countries. 16 U.S.C. § 1536; cf. 16 U.S.C. § 1531(c) (stating the congressional policy that "all" federal agencies conserve endangered and threatened species). Also, by its terms the jeopardy clause applies to all species listed under the Act. 16 U.S.C. § 1536. There is no exception for foreign species, and most of the animals listed as endangered or threatened are in fact foreign animals. 50 C.F.R. § 17.11. Congress would not have made the jeopardy clause applicable to foreign species if it did not intend the clause to apply to activities taking place in the countries where such species are found.

The Act's legislative history confirms this analysis. Admittedly, the history dealing exclusively with section 7 says

nothing about applicability overseas. But section 7 cannot be isolated from the remainder of the Act. In construing the jeopardy clause, the history of the entire statute must be examined. During the debates leading up to passage, Congressman Dingell, Chairman of the House Subcommittee on Fisheries and Wildlife Conservation and the Environment, made the following observation:

> The purposes of the bill include the conservation of the species and of the ecosystems upon which they depend, and *every* agency of Government is committed to see that those purposes are carried out. It is a pity that we must wait until a species is faced with extermination before we begin to do those things that we should have done much earlier, but at least when and if that unfortunate stage is reached, the agencies of Government can no longer plead that they can do nothing about it. They can, and they *must*. The law is clear. 119 Cong. Rec. 42913 (1973) (emphasis added).

In addition, during the House hearings, of which he was Chairman, Congressman Dingell made this statement:

> The point I want you to come around to understand is that this country wants a management program that is going to maintain these populations *around the world*. Hearings on Endangered Species [H.R. 37 and Others] Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 93rd Cong., 1st Sess. 349 (1973) (emphasis added).

Thus, the legislative history for the Act as a whole shows that the statute is aimed at protecting *foreign* species, and *every* federal agency is committed to this protection. In light of this overall purpose, any argument that the jeopardy clause is not applicable to foreign activities is simply devoid of logic.

Other environmental statutes, having far less express foreign concern than the Act, have been held by the courts to apply extraterritorially. In *Environmental Defense Fund v. Agency for International Development,* Civ. Action No. 75-0500 (D.D.C. 1975), a stipulated settlement approved by the court stated that the Natonal Environmental Policy Act of 1969, 42 U.S.C. §§ 4231 *et seq.*, [hereinafter "NEPA"] applied to an international pest management program sponsored by A.I.D. As a result of *Environmental Defense Fund, supra,* A.I.D. also adopted NEPA regulations for its other international programs. 41 Fed. Reg. 26913, 22 C.F.R. Part 216 (1976). In *Sierra Club v. Coleman,* 405 F. Supp. 53 (D.D.C. 1975), NEPA was likewise held to apply to the Federal Highway Administration's construction of the Pan American Highway between Panama and Columbia. In *United States v. Mitchell,* 6 Envir. L. Rptr. 20683 (S.D. Fla. 1976), the Marine Mammal Protection Act, 16 U.S.C. §§ 1361 *et seq.*, was held applicable to extraterritorial actions of U.S. citizens. If NEPA and the Marine Mammal Protection Act apply outside the United States, the Act should definitely be held applicable to foreign activities for one of the Act's primary functions is the conservation of foreign species. 16 U.S.C. § 1531(b).

Of course, it is argued that the Act's concern for foreign wildlife is limited to the international cooperation provided in section 8, 16 U.S.C. § 1537. Clearly, section 8 does afford protection to foreign species through international programs, financial aid, and technical assistance, but section 8 is by no means the only provision of the Act protecting foreign species. Section 9, 16 U.S.C. § 1538, contains the most significant protections, and that section operates independently from international cooperation. Among other things, section 9 prohibits foreign endangered species from being imported, or transported or sold in foreign commerce. Section 9 is applicable to any "person" subject to the jursidiction of the United States, and "per-

son" includes departments or instrumentalities of the Federal Government. 16 U.S.C. § 1532(8). Moreover, subsection 9(g) makes it a separate offense to cause or solicit any violation prohibited elsewhere in the section. Violations of section 9 invoke the penalties of section 11, 16 U.S.C. § 1540, and the sanctions of section 11 include substantial civil penalties, fines, imprisonment, and citizen suits. Would Congress subject federal agencies to stiff criminal and civil penalties for causing violations involving foreign species, and yet permit those same agencies to jeopardize the existence of such species through improper foreign activities? Obviously not. The prohibitions of section 9 compel the conclusion that the jeopardy clause of section 7 applies to federal activities abroad.

Nevertheless, it is still argued that section 7's jeopardy clause is inapplicable to foreign activities absent a treaty so requiring; that using the jeopardy clause to curb the overseas activities of federal agencies would infringe on the sovereignty of foreign countries by imposing on them the environmental policies of the United States; and that applying the jeopardy clause abroad would be too burdensome on the agencies, particularly in instances requiring prompt and decisive action.

Suffice it to say that nowhere in the statute or its legislative history is there any indication that applicability of section 7 is contingent upon the conclusion of another treaty. Indeed such a condition would be curious at best given the Act's purpose of implementing existing treaties. 16 U.S.C. §§ 1531(b), 1537(e). With regard to infringing on foreign sovereignty, section 7's jeopardy clause is no greater imposition of U.S. environmental policy than section 9's prohibitions, or than section 11's provision for forfeiting foreign species and products if they are seized by U.S. agents. It should be remembered that the jeopardy clause actually applies only to U.S. agencies, and to the extent such application impacts on foreign governments,

adequate explanation thereof may be properly transmitted through the Department of State. Finally, the burdens on federal agencies imposed by the jeopardy clause may be dealt with and alieviated in the Service's implementing regulations. They are not a reason for denying the clause's foreign applicability altogether.

For the reasons stated above, we conclude that the jeopardy clause of section 7 is applicable to federal activities affecting listed species in foreign countries. This conclusion does not alter our opinion of February 13, 1976, contained in a memorandum to the Associate Director, Federal Assistance, from the Assistant Solicitor, Fish and Wildlife, that section 7 does not authorize the designation of critical habitat areas in foreign countries. As stated in our earlier memorandum, section 7 imposes a condition of direct consultation with the affected state before critical habitat may be designated in that state. 16 U.S.C. § 1536. There being no provision for direct consultation with the affected foreign country, we concluded that Congress did not intend critical habitat to be designated abroad. However, with respect to section 7's jeopardy clause, there is no condition of separate consultation with the affected sovereign, and absent this condition, we believe the jeopardy clause applies to the foreign activities of federal agencies.

ASSISTANT SECRETARY OF STATE
OCEANS AND INTERNATIONAL
ENVIRONMENTAL AND SCIENTIFIC AFFAIRS
Washington, D.C. 20520

April 28, 1978

Mr. Keith M. Schreiner
Associate Director
Federal Assistance
U.S. Fish and Wildlife Service
18th and C Streets, N.W.
Washington, D.C. 20240

Dear Mr. Schreiner:

Thank you for drawing our attention to the final regulations on interagency cooperation under Section 7 of the Endangered Species Act of 1973 (the Act) published by the United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) in the Federal Register of Wednesday, January 4, 1978. In light of our comments on the draft regulations, as I am sure you will appreciate, these final regulations cause us some serious concern.

In keeping with the objectives of the Act, the Department is considering internal procedures to assess on a continui ıg basis its activities for any potential harmful impact which might jeopardize the continued existence of a species listed under the Act. We welcome the readiness of FWS and NMFS to provide available technical information which can be invaluable in better enabling us to make such determinations, and we intend to take full advantage of this opportunity for such consultation.

The Department of State fully supports the policy of conservation of endangered and threatened species which is embodied in the Act. We are anxious to fulfill our obligations under Section 7 of the Act to consult with FWS and NMFS to ensure that our activities do not jeopardize the continued existence of endangered and threatened species nor destroy or modify the critical habitats of such species. The Department, however, does not agree with the FWS' and NMFS' interpretation of the scope of the obligation of federal agencies to consult under Section 7 and consequently objects to the scope of the requirement for consultations contained in the regulations.

In particular, we do not concur with the interpretation of the scope of Section 7 which is indicated in Section 402.01 of the regulations with respect to the obligation to consult with FWS and NMFS in order to ensure that agency activities do not jeopardize the continued existence of endangered and threatened species. Our previously expressed disagreement with this interpretation was contained in our letters of September 2, 1976, and December 17, 1976, from Donald R. King, Acting Director of the Office of Environmental Affairs, commenting on the proposed regulations. Our concern is more acute now in view of the fact that the final regulations, unlike the proposed regulations, make the consultation procedure of Section 7 mandatory.

It is a general rule of statutory construction that a statute should have extraterritorial application only if there is clear evidence of such a Congressional intent. In our opinion, there is nothing in the language of Section 7, nor the structure and the legislative history of the Act to indicate that Congress intended that Section 7 would apply extraterritorially. Indeed, the last phrase of Section 7, referring to "habitat . . . which is determined by the Secre-

tary, *after consultation as appropriate with the affected States,* to be critical" (emphasis added) suggests precisely the opposite—that the obligation to consult under Section 7 applies only to federal agency activities having effects in the United States.

Additionally, as a matter of policy, the Department of State objects to the extraterritorial application of Section 7. An analysis by a United States agency of the impacts on endangered and threatened species in, and policy options available to, foreign countries may be perceived by them as an unwarranted interference in matters within their jurisdiction. This is particularly likely in the case of countries which are not parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora. Moreover, the mechanics of complying with the consultation procedure established by the Section 7 regulations would often be incompatible with the speed, confidentiality and flexibility which are prerequisites of effective diplomacy.

Even if the interpretation of Section 7 suggested by FWS and NMFS were correct, we believe the requirements contained in the regulations are unwarranted, and compliance would cause us very serious difficulties. The regulations require federal agencies to determine whether their activities may affect endangered or threatened species outside the United States and to gather enough biological information for the FWS or the NMFS to determine whether the activities will jeopardize the continued existence of such species. By contrast, the regulations are silent on the question of whether the Section 7 requirement to consult with the FWS and the NMFS to ensure that agency activities will not destroy or modify critical habitat applies extraterritorially, and the FWS has implied that it does not by indicating that it does not intend to designate critical

habitat in areas outside the United States. The extraterritorial application of half of Section 7, but not the other half, is illogical because the two obligations imposed by Section 7 are not severable. One of the most fundamental ways in which an activity may be deemed to jeopardize a species' continued existence is by evidence of its harm to the species' critical habitat.

In the absence of the designation of critical habitat outside the United States, the Department of State cannot, as a practical matter, comply with the requirements to consult contained in the regulations. If the agency with expertise in identifying factors crucial to the continued survival of endangered and threatened species finds it difficult or impossible to do so outside the United States, this Department, lacking the necessary expertise, will find the task virtually impossible. It is therefore conceivable that an activity could be indefinitely postponed because we were unable to supply sufficient information to permit the FWS to determine if the activity would jeopardize the continued existence of an endangered or threatened species abroad.

For the above reasons, this Department feels that an extraterritorial interpretation of Section 7 must not be reflected in the regulations or, at the very least, consultations on impacts in foreign jurisdictions should be made discretionary with each federal agency.

Our legal, policy and practical difficulties with the final regulations do not indicate a lack of concern on our part for the fate of endangered and threatened species outside the United States. As you know, this Department has strongly supported international efforts aimed at conservation of fish, wildlife and plants facing extinction. We intend to pursue all practicable measures to protect endangered or threatened species outside of the United States. These measures may include consultations with

other nations on the impact of particular activities on endangered and threatened species and the provision of financial and technical assistance for efforts to protect such species. In both multilateral and bilateral contexts, we are promoting the development of international law for the conservation of species facing extinction. As our efforts expand, we will engage in a continuing review with a view to improving them, while bearing in mind the needs of diplomacy and respect for national jurisdiction. We would welcome an opportunity to discuss our difficulties with the final regulations and possible measures to protect endangered and threatened species with you.

Very truly yours,

/s/ Patsy T. Mink

PATSY T. MINK
Assistant Secretary

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D.C. 20515

JOHN D. DINGELL
16th District, Michigan

July 10, 1978

The Honorable Cyrus R. Vance
Secretary
Department of State
Washington, D.C. 20520

Dear Mr. Secretary:

I am aware that within the State Department there is some degree of uncertainty with respect to the applicability of the Endangered Species Act, particularly section 7, to extraterritorial actions by the State Department. Quite frankly, I am surprised that there is any confusion whatsoever regarding this matter in light of both the language and legislative history of the Act.

As author of the Endangered Species Act of 1973, I feel it is manifestly clear that the Act applies to the actions of all Federal agencies. Section 2(c) of the Act states:

> "It is further declared to be the policy of Congress that *all* Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act." (emphasis supplied)

An important justification for this legislation was the fact that actions of a majority of the Federal departments could conceivably and adversely affect endangered and threatened species of animals and plants as well as their critical habitats.

This line-of-reasoning is reinforced by the language of section 7 of the Act which states:

> "The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. *All* other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize these authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered and threatened species . . ." (emphasis supplied)

The clear intent of this Act was to protect endangered and threatened species of the world community. When the Endangered Species legislation (H.R. 37) was debated and passed by the House on September 18, 1973, I stated the following on the record:

> ". . . it is a bill which has been carefully drafted to encourage state and foreign governments to develop healthy stocks of animals occurring naturally within their borders."

Likewise, during the Floor debate, Congresswoman Sullivan stated that, "the purpose and intent of the bill before you is to bring into focus the costs of further endangering the plants and animals of the world."

To accomplish this purpose and goal, it was intended that the consultation procedures established in section 7 of the Act apply not merely to just a select few government agencies but to all government agencies. Extraterritorial actions by the State Department – which very well might adversely affect the integrity of endangered or threatened species – were never exempted or intended to be exempted from this process. Both sections 2 and 8 of the Act clearly contemplate that the Convention on International Trade in Endangered Species of Wild Fauna and Flora as well as

other international agreements be used as an integral component in the implementation process. The absence of effective State Department participation in this process would be preposterous.

I am greatly troubled that the Department of State may possibly have an unclear perception of the intent of this Act. Because I am so advised that a conflict may very well exist at this juncture, I would appreciate receiving your policy statement specifically addressing the question of the Endangered Species Act's applicability to extraterritorial Departmental action. I would appreciate an expeditious response to my inquiry and would hope that this matter soon can be resolved.

Thank you in advance for your cooperation in this matter.

With every good wish,

Sincerely yours,

John D. Dingell
Member of Congress

Wc

cc: The Honorable Robert C. Brewster
The Honorable Robert L. Herbst

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
Washington, D.C. 20314

Reply to Attention of: DAEN-CCJ

20 July 1979

Mr. Robert S. Cook
Acting Director
Department of Interior
Fish and Wildlife Service
Washington, D.C. 20240

Dear Mr. Cook:

Thank you for the opportunity to comment on the draft proposed regulations to implement Section 7 of the Endangered Species Act of 1973, as amended, invited by your letter addressed to the Chief of Engineers and dated 13 June 1979.

While this office was unable to analyze and respond to those draft regulations within ten working days after receiving them, Mr. David Wesley of the Service has assured Mr. Bushman of my staff that our comments can be considered if received on 20 July 1979, or very soon thereafter.

Please find attached the comments of the Civil Works Directorate of the U.S. Army Corps of Engineers, which I trust you will find helpful.

Sincerely yours,

/s/ Hugh G. Robinson

HUGH G. ROBINSON
Brigadier General, USA
Acting Director of Civil Works

1 Incl
As stated

Section 402.01 Scope

Section 402.01 of the draft proposed Interior/Commerce regulations describes the "scope" of the regulations: i.e., to interpret and implement Section 7(a)-(d) of the Act. As explained above, the Act authorizes Interior and Commerce *only* to interpret and implement *their own* specific responsibilities under the Act, and to establish reasonable terms under which Interior and Commerce will consult with and advise other Federal agencies. If the draft proposed regulations go beyond that point, to instruct other Federal agencies how they must interpret and implement *their* responsibilities under the Act, that would be inappropriate and, moreover, *ultra vires*.

Section 402.02 Definitions

1. The proposed definition of "activities or programs" would continue an unsubstantiated and not-legally-authorized assertion which now appears in 50 CFR Section 402.01: i.e., that Section 7 restricts the activities of Federal agencies within the territorial jurisdiction of foreign countries. The Memorandum Opinion of the Assistant Solicitor for Fish and Wildlife, Office of the Solicitor, U.S. Department of the Interior, dated February 13, 1976, presents much of the evidence (e.g., from legislative history) which indicates that Congress did *not* intend Section 7 to apply to the territory of foreign nations. Even though that Solicitor's opinion concludes that Interior and Commerce should not attempt to designate *critical habitat* in foreign states, the evidence presented in the opinion demonstrates that the entirety of Section 7 applies to United States territory, not to foreign countries. By analogy, the holding and reasoning of the U.S. Circuit Court of Appeals for the Fifth Circuit in *U.S. v. Mitchell* (553 F.2d 996, 5th Cir. 1977) supports the conclusion that no part of Section 7 ap-

plies to the activities of United States Government agencies on the lands or territorial seas of foreign sovereignties.

An overseas mission of the U.S. Army Corps of Engineers provides a case example demonstrating why the terms of Section 7 should not be stretched to control U.S. Government activities in foreign nations. The Corps of Engineers serves as the contracting/engineering/construction agent for large-scale "nation-building" programs in Saudi Arabia, thereby serving U.S. diplomatic and economic interests. If the Saudi Government chooses to build a facility on a given site, the Corps could not reasonably or appropriately interfere with that decision because some endangered species might be disturbed (unless, of course, the Saudi Government were to instruct the Corps to protect the species). In addition, U.S. national defense activities abroad could be seriously hampered if U.S. agencies must act to protect endangered species for which the host foreign government has no concern or regard.

DEPARTMENT OF STATE
Washington, D.C. 20520

July 31, 1979

Mr. Harold J. O'Connor
Acting Director
United States Department of Interior
Fish and Wildlife Service
Office of Endangered Species
Washington, D.C. 20240

Dear Mr. O'Connor:

Thank you for giving us the opportunity to review the draft proposed regulations being jointly issued by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) to amend the existing regulations concerning consultations under Section 7 of the Endangered Species Act Amendments of 1978.

The proposed regulations preserve an element – applicaiton to the high seas and foreign countries – which is of great concern to this Department, as your office is aware. As we explained in a letter dated April 28, 1978, from Patsy T. Mink, then Assistant Secretary for Oceans and International Environmental and Scientific Affairs, this Department does not concur with the interpretation that federal agency obligations under Section 7 extend to actions having effects on the high seas or in foreign countries.

Our conclusion that Section 7 does not as a legal matter apply extraterritorially is based upon the rule of statutory construction that a statute should have extraterritorial application only if there is clear evidence of such a Congressional intent. We have found no indication in Section 7

and its legislative history of an intent to apply the requirements of Section 7 extraterritorially.

The language of Section 7 contains evidence that Congress intended it to apply only to the domestic activities of federal agencies. The section states in pertinent part:

> "Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded or carried out by such agency (hereinafter in this section referred to as an 'agency action') does not jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, *after consultation as appropriate with the affected States,* to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section." (Emphasis added.)

The fact that the section refers to consultation with "affected States," and does not provide for consultation with affected countries through the Secretary of State, strongly suggests that Congress intended it to apply only to agency actions having effects within the United States. We do not find persuasive the FWS' argument that the requirement of Section 7 to avoid jeopardy of an endangered or threatened species and the requirement to avoid adverse modifications of critical habitat are severable, the first applying to agency action everywhere, the second applying only in the United States. Not only do we find it difficult to believe that Congress could have intended different territorial application within two phrases of the same sentence, but we believe the two requirements cannot be completely severed, as one of the most likely ways an action could jeopardize the continued existence of an en-

dangered or threatened species could be by destroying or adversely affecting its critical habitat.

The 1978 amendments to Section 7 provide further support for the view that Section 7 does not apply extraterritorially. The Endangered Species committee created to grant exemptions from the Section 7 requirement is composed of seven members including an individual appointed by the President from each affected State. The Secretary of State is not a member of the Committee. The inclusion of individuals from the affected States is evidence that Congress considered Section 7 to be applicable to agency actions having effects within the United States. The exclusion of the Secretary of State, whose invlovement as the official responsible for the day-to-day conduct of foreign policy, is provided for everywhere in the act where foreign policy concerns are involved (e.g., in Section 4 concerning the listing of species outside the United States) supports the some conclusion, as does the failure to provide foreign countries with the option of seeking an exemption.

Our interpretation of Section 7 is bolstered by the decision in *United States v. Mitchell,* 553 F.2d 996 (5th Cir. 1977), where the court was faced with the question whether the Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. Section 1361, *et seq.*, which was designed to protect species of marine mammals, should be applied to regulate the conduct of U. S. nationals in foreigh territories. The court stated the rule of statutory construction concerning extraterritorial application as follows: If the nature of the law does not mandate its extraterritorial application, a presumption arises against such application; to overcome this presumption, a clear expression of Congressional intent must be shown.

The *Mitchell* court noted that because conservation statutes, like the MMPA, deal with the exploitation and

preservation of natural resources, they are limited by the authority of other sovereign states to control the use of natural resources within their own territories. Other countries may, of course choose to observe different priorities in the exploitation of their natural resources. In the absence of an explicit indication of intent, the court was not willing to presume that Congress intends to make choices for other countries concerning effects on resources within their jurisdiction. In addition, the court found in a separate section of the MMPA, which authorizes the Secretary of State to negotiate bilateral and multilateral agreements to protect marine mammals, evidence of Congressional intent to deal with marine mammal protection in foreign countries through negotiation and agreement, rather than through imposition of one particular choice extraterritorially.

The reasoning of the *Mitchell* case is clearly applicable to the ESA. Notably, the ESA also contains a separate section, Section 8, establishing the United States approach to international protection of endangered species. Section 8 implements the Convention on International Trade in Endangered Species of Wild Flora and Fauna and other treaties listed in ESA, Section 2, by authorizing the President to designate a Management Authority which will "do all things assigned to [it] . . . under the Convention, including the issuance of permits and certificates" for the importation or exportation of endangered species listed in the Annexes to the Convention. Executive Order No. 11911, 41 Fed. Reg. 15683 (1976), appointed the Secretary of the Interior as the Management Authority and spelled out procedures for the Convention's implementation by the United States. Under the Convention, other states parties are similarly obligated to set up management authorities to supervise implementation of the Convention within their respective jurisdictions.

In addition, Section 8 authorizes the Secretary of the Interior, through the Secretary of State, to (1) use foreign currencies generated under PL-480 for the purpose of furnishing assistance to foreign countries in the development and management of programs useful for the conservation of endangered and threatened species; (2) encourage foreigh countries to provide for the conservation of fish or wildlife including endangered species and threatened species listed pursuant to Section 4; (3) encourage the entering into of bilateral or multilateral agreements with foreign countries to provide for such conservation; and (4) encourage foreign persons who directly or indirectly take fish or wildlife in foreign countries or on the high seas for importation into the United States for commercial or other purposes to develop and carry out conservation practices designed to enhance such fish or wildlife and their habitat. Section 8, like the comparable section in the MMPA, evidences a Congressional intent to deal with endangered species protection outside the United States through bilateral or multilateral negotiation and agreement rather than unilaterally.

As we have noted previously, were Section 7, particularly as altered by the 1978 amendments, to apply extraterritorially, it would be in many ways incompatible with the prudent conduct of foreign relations. Foreign countries are likely to regard analyses by United States agencies on endangered and threatened species in their territory and policy options available to them as intruding in matters within their jurisdiciton. As a result, some countries may be unwilling to permit the gathering of information in their territories or to supply information available to them. In addition, the rigid procedural requirements and absolute requirements for biological assessments, consultations, and biological opinions set out in Section 7 are

not realistic in the context of actions having effects outside the United States, where the need to work with other countries requires cooperation, flexibility of timing and, in some cases, confidentiality.

I am confident that you will appreciate that, while we disagree with your interpertation of Section 7's application to the effects abroad of federal agency actions, we are very concerned about the fate of endangered and threatened species on the high seas and in foreign countries. As you know, this Department has strongly supported international efforts aimed at conservation of fish, wildlife and plants facing extinction. We do not believe that adequate interagency discussion has taken place on this issue. We would appreciate the opportunity to continue the discussions initiated earlier between the Department of the Interior and the foreign affairs agencies concerning the proposed regulations and possible measures that might be taken consistent with other obligations, to protect endangered and threatened species.

Sincerely yours,

/s/ William Alston Hayne

WILLIAM ALSTON HAYNE
Deputy Assistant Secretary
for Environmental Affairs

L/OES:MMcLeod:sc
7/31/79:Ext 21989

Clearances: OES/ENE:DRKIng
L:MBFeldman
OES/ENH:WHMansfield

DEPARTMENT OF STATE
AGENCY FOR INTERNATIONAL DEVELOPMENT
Washington, D.C. 20523

August 8, 1979

Mr. Harold J. O'Connor
Acting Director
Fish and Wildlife Service
Department of Interior
Washington, D.C. 20240

Dear Mr. O'Connor:

Thank you for the opportunity to comment on the draft regulation proposed by the Fish and Wildlife service (FWS) and the National Marine Fisheries Service amending existing regulations regarding section 7 of the Endangered Species Act to conform to the 1978 amendments to section 7.

The Department of State, in a letter form William Alston Hayne, Deputy Assistant Secretary for Environmental Affairs, to you, dated July 31, 1979, states the Department's view that section 7 does not have extraterritorial application. A.I.D. agrees with this conclusion. This is a position we have presented to FWS on numerous occasions.

We believe the proposed regulations establish procedures which would cause unnecessary and unacceptable delays in conducting assistance activities in foreign countries. In addition, the regulations do not address foreign policy sensitivities or establish procedures for considering the views of foreign soveriegns, in whose territories assistance activities are conducted, regarding their development objectives, public interests, national

priorities, or their own plans for protecting endangered or threatened species and critical habitat.

Proposed amendments to A.I.D.'s environmental procedures, including a section regarding endangered and threatened species, will soon be published in the Federal Register for public comment. These procedures were discussed with representatives of enviromental organizations and federal agencies, including FWS, on June 19, 1979, prior to our receiving a copy of your draft regulations regarding section 7.

A.I.D. proposes to use these amended environmental procedures to protect endangered and threatened species and their critical habitat. I would be pleased to meet with representatives of the FWS to discuss in greater detail this proposal and other aspects of the draft FWS regulations regarding section 7.

Sincerely yours,

/s/ ALBERT PRINTZ

Albert Printz
A.I.D. Environmental Coordinator

OFFICE OF THE ASSISTANT SECRETARY
OF DEFENSE
WASHINGTON, D.C. 20301

IR
MANPOWER
RESERVE AFFAIRS
AND LOGISTICS

9 AUG 1979

Harold J. O'Connor
Acting Director
Fish and Wildlife Service
U.S. Department of the Interior
Washington, D.C. 20240

Dear Mr. O' Connor:

This is an interim response to your letter of June 12, 1979 to the Secretary requesting the comments of the Department of Defense on draft proposed regulations to implement revised Section 7 of the Endangered Species Act of 1972, as amended.

Our review is still incomplete principally since we are concerned with three aspects of the proposed regulation as follows:

(a) The authority for the Department of the Interior to issue regulations on the consultation aspects of the revised Section 7.

(b) The requirement in Section 402.01 of the proposed regulations regarding consultation on each project that may impact a threatened or endangered species on the high seas or in foreign countries.

(c) Participation of the U.S. Fish and Wildlife Service in the preparation of additional studies as part of the biological assessment under Section 402.04, Biological Assessments for Construction Projects.

Our review should be completed by the end of August 1979 at which time we will communicate further with you. We regret our delay in responding but believe the rulemaking and international consequences of your proposal merit this additional time.

Sincerely yours,

/s/ PERRY J. FLIAKAS

Perry J. Fliakas
Deputy Assistant Secretary of
Defense
(Installations and Housing)

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

AUG 8, 1979

MEMORANDUM

To: Assistant Secretary, Fish and Wildlife and Parks

From: Solicitor

Re: Endangered Species Act of 1979 Amendment Regulations

You may recall that when the existing regulations on the Endangered Species Act were published in 1978, they asserted the position that the Endangered Species Act applies to U.S. governmental agency actions abroad. These regulations were published over the objection of the State and Defense Departments. Those Departments did not, however, elevate the issue for a Presidential decision. At the time, they were vigorously debating the international application of NEPA.

Following the amendments to the Endangered Species Act, the regulations must now be amended as well. Those amendments carry forward this legal position and, I understand, provide future guidance with regard to procedures for consultation in the international context. The State and Defense Departments have again objected on policy and legal grounds and are now prepared to have the matter resolved at the White House, if necessary.

I have not personally reviewed the legal and/or policy issues involved, but plan to do so immediately. If I am convinced that the Endangered Species Act does have international application, the matter will have to be resolved

by Justice or the White House. Consequently, please do not promulgate these amended regulations into final until I have personally surnamed them. I would also like to know the significance of delaying the publication of the final regulations for a brief period while we sort out this difficult issue.

/s/ LEO KULIZ

Leo Kuliz
Solicitor

UNITED STATES GOVERNMENT

MEMORANDUM

Date: March 26, 1980

Reply to
Attn of: David A. Ferguson

Subject: Accelerated Mahaweli Project (AMP)/U.S. AID Program to Develop the Water Resources of Sri Lanka

To: Chief, International Affairs

Following the initial 1978 consultations with FWS, AID has maintained a fairly low profile in their coordination on the Mahaweli Project with us until recently. Two meetings (January 29 and February 28, 1980) were held between AID and Service personnel (see attached draft memorandum from Dick Mitchell, OES, to Chief, OES).

Since AID's interest in having FWS participation seems to have increased, Dr. Mitchell felt that any Service participation should logically be coordinated through the IA office. Thus, with my agreement he set up a meeting with Mike DeMetre, AID Mahaweli Project and Jane Stanley, Asia Bureau Environmental Officer.

We met at the Rosyln AID Asia Bureau Office on March 17, 1980. Besides DeMetre and Stanley from AID, Dick and Lynn West from OES and I formed the Service contingent. Jane gave us copies of the TAMS (Tippetts, Abbett, McCarthy and Stratton) "Environmental Assessment Mid Term Report" dated 1 Feb 1980 as well as a report entitled "Annex X, Environmental Aspects Mahaweli Ganga Development Program Implementation Strategy Study" dated Sept 1979. The latter report was done by a Dutch consultant (Nedeco) for the Netherlands Ministry of Foreign Affairs.

Jane was putting together a letter of comment on the TAMS report for the AID Mission in Sri Lanka and asked us to provide comments to her on the TAMS report by March 28 so she could get the letter off the first week in April. We agreed.

AID's commitment to the Mahaweli Project is $100 million which is the largest single project in AID's budget. Both the Administrator of AID and Deputy Administrator of AID are supportive of doing environmental work in Sri Lanka. The AID Sri Lanka Mission Director Sarah Jane Littlefield, and the Project Officer, Jeff Evans, in the Mission, are likewise very supportive. Jeff has been working closely with the host government which is vitally concerned with the wildlife aspects.

Mike indicated the project area was divided into four parts denoted as Systems A, B, C, and D. AID was involved with System B; World Bank with C. B is the largest of the four land areas to be developed under irrigated agriculture in the AMP and along with System C will be the initial area to be developed under the program. Not only is AID responsible for the design and construction of the canal works in System B, but for mitigation of negative environmental effects of the accelerated Mahaweli program.

At the earlier meetings with Mitchell, Stanley gave him copies of Volumes I-III of the System B Design and Supervision Plan. According to Stanley the next step in the process is to produce a Construction Paper for System B (In the AID process there are two parts to the construction paper phase (1) PID-Project Identification Document – briefly describing the plan, and (2) Project Paper – the final project plan). The Construction Paper is to be started this summer for AID/D. approval in November 1980 or Janary 1981.

At the same time the PID is started, work will begin on the Wildlife Project. This latter project will discuss mitigation of negative environmental effects of the AMP. It will probably include assisting, training, and equipping the staff of the Sri Lanka Department of Wildlife Conservation. Jane had no idea of what the cost budget for this would be as of yet. The project will probably be put together by a person from TAMS, although the alternate decision will be made by the Mission. It will have to come to D.C. for approval.

Mike and Jane are looking to the Service for assistance in reviewing the TAMS report, providing information on threatened and endangered species, identifying Sri Lanka's wildlife expertise and advising on overall wildlife aspects of the project. They see the definition of base line resource information and the recording of changes as important in predicting possible impacts. Mike was enthusiastic about using remote sensing as an operational tool in recording animal movements, such as elephants, as well as habitat changes (we promised to supply him with contacts for such work).

Stanley and DeMetre would like to be able to take the TAMS material from System B and see if it could be integrated with System C. Mike felt that the World Bank should be interested in this aspect as they were involved with System C; that Bob Goodland, Environmental Officer at the Bank, might go along with some kind of grant to study the environmental aspects.

Jane expected that the Mission would ask her to lay out the basis for the P.I.D. on the Wildlife Project and she might ask the Service for help.

Mike was planning a ten-day trip to Pakistan, Sri Lanka and Bangladesh from April 14-24, 1980 and would be asking what was being done on plants and remote sensing. He

would advise the Mission the Service was willing to provide some assistance on points mentioned above and would set up arrangements for Dick Mitchell's visit in late July 1980.

Attachment

cc:
IA Read File
Sri Lanka-Mahaweli File
Dr. Richard Mitchell, OES

FWS/IA:DFerguson:cb 3/27/80

In Reply Refer To:
FWS/OES

May 9, 1980

Mr. Albert C. Printz
Environmental Affairs Coordinator
Agency For International Development
U.S. Department of State
Washington, D.C. 20523

Dear Mr. Printz:

In response to your request, I am enclosing the following: (1) Comments on the Mid-Term Report of the Environmental Assessment of the Accelerated Mahaweli Development Program, Sri Lanka; (2) Recommendations; (3) List of Contacts. These should not be considered as the official position of the U.S. Fish and Wildlife Service (FWS) on this project. Although you have indicated that this request for assistance should not be construed as a request for consultation under Section 7 of the Endangered Species Act, I wish to emphasize that our willingness to be of assistance on Endangered species problems does not negate our belief that overseas projects conducted by United States agencies require Section 7 consultation if listed species may be affected. We are willing to provide the assistance requested, open up avenues of cooperation, and provide assistance on other U.S. Agency for International Development (AID) projects. We feel that this is an important step in interagency cooperation and in the conservation of listed species.

As requested in your letter to Mr. Ronald E. Lambertson, FWS and AID representatives met on January 29, 1980, to disuess this Service's possible role in furnishing expertise and recommendations to AID in order to alleviate negative impacts of the AMP on listed species. Two

additional meetings were held (February 28 and March 17, 1980) with U.S. AID/Asia representatives (Mike DeMetre, Jane Stanley) and representatives of the International Affairs Office (IA) (David A. Ferguson) and the Office of Endangered Species (OES) (Dr. Richard M. Mitchell). As agreed to in these meetings, the FWS is furnishing AID with a list of experts on the flora and fauna of Sri Lanka, along with our comments on the Mid-Term Report and recommendations for alleviating negative impacts to wildlife, especially Threatened and Endangered species.

The Accelerated Mahaweli Development Program presents a unique opportunity for AID to demonstrate to Third World Nations that development and wildlife preservation can go hand-in-hand in well-thought-out projects. AID has taken the initiative and has sponsored and financed the Environmental Assessment for the entire Accelerated Mahaweli Project (AMP); even though their involvement is only with the financing of the design, construction, and supervision of the main and major branch canals in System B. AID is concerned about the continued existence of Endangered and Threatened species in Sri Lanka and has asked FWS for their assistance in preparing recommendations on ways to minimize or eliminate the negative impacts to listed species. AID plans to assist the Sri Lankan Department of Wildlife Conservation and has appropriated $400,000 for FY 81 to train and equip the wildlife department staff.

This is an important beginning to alleviate negative impacts to wildlife and listed species. The magnitude of the Accelerated Mahaweli Development Program could have massive environmental impacts on such an insular ecosystem as the Mahweli River system. There are several factors that favor the wise development of this project with minimum impact to the environment and wildlife: 1) The Sri Lankan government realizes the importance of the

wildlife as part of their national heritage. 2) The government has a good wildlife parks system and a functional Department of Wildlife Conservation. 3) The fauna and flora of Sri Lanka is well-studied and competent personnel are present within the country. 4) U.S. AID has undertaken the obligation to assist the Sri Lankan government in trying to minimize the negative impacts that this massive project could have on wildlife.

With long-term assistance (5-10 years) from the institutions sponsoring the AMP, Sir Lanka could be a showcase to developing nations on how to develop their potential resources with minimum impact to the environment and wildlife. The Sri Lankan government lacks the necessary finances to undertake any long-term management programs to avoid the negative impacts to the wildlife. The donor nations and agencies that are financing the AMP will be the key as to how successfully the wildlife is preserved. If wildlife problems receive the same level of attention as the engineering project, then the negative impacts to the environment can be alleviated. This means that there has to be long-term funding in sufficient amounts to stem the negative impacts of this project.

Sincerely yours,
JOHN L. SPINKS, JR.
Director

Enclosures

cc: Directorate Reading File
DD Chron File

FWS/OES:RMitchell:sm 5/5/80

ASSISTANT SECRETARY OF STATE
OCEANS AND INTERNATIONAL
ENVIRONMENTAL AND SCIENTIFIC AFFAIRS
Washington, D.C. 20520

April 20, 1981

Mr. G. Ray Arnett
Assistant Secretary Designate
for Fish and Wildlife and Parks
Department of the Interior
Washington, D.C. 20240

Dear Mr. Arnett:

On February 24, 1981 Dr. F. Eugene Hester, Acting Director of the U.S. Fish and Wildlife Service, circulated to the Department of State and other Federal agencies revised draft proposed regulations to govern consultations under Section 7 of the Endangered Species Act. We have carefully reviewed the draft proposed regulations.

For a number of reasons, the Department of State is strongly opposed to the proposed regulations.

As we have informed your Department on a number of occasions, the Department of State does not share the view that the consultation procedures under Section 7 of the Act are applicable to actions of Federal agencies having effects on the high seas or in foreign countries. We find no evidence in the Act itself to support this view, and we find considerable evidence in the Act and in established rules of statutory construction to the contrary. For this reason, we strongly believe that if the proposed regulations are to have a sound legal basis they must be be redrafted to make clear that they do not apply to Federal agency actions having effects on the high seas or in foreign countries. (A copy

of our letter of July 31, 1979 to Mr. Harold J. O'Connor, with a legal analysis, is attached for your reference.)

Promulgation of the proposed regulations in their present form, if upheld, would create a number of serious problems for the Department of State, as well as for other Federal agencies.

The proposed regulations would impose substantial new personnel, financial, and paperwork requirements on the Department. This would be directly contradictory to one of the Administration's major objectives, that of reducing the regulatory burden. In our view the proposed regulations do not meet the requirements of Executive Order 12291, and I doubt that the proposed regulations will survive scrutiny by the Vice-President's task force or OMB. There is also an important practical consideration. Under the present reality of severe budgetary and personnel constraints, it is most unlikely that additional funds or personnel would be made available to the Department or to any other affected agency to discharge the many obligations envisaged by the proposed regulations. Thus, any attempt by the Department to fulfill these obligations would require the reallocation of resources from other, ongoing activities. The Department, as is the case with many Federal agencies, has already been required to accept significant budget and personnel restraints, and is not in a position to cut further our essential and established activities to execute the new obligations envisaged in the proposed regulations. In this regard, I might note that the proposed regulations would also impose substantial new obligations on the U.S. Fish and Wildlife Service. I assume that the Service is operating under the same budget and personnel constraints as this Department, and I wonder whether the Service has adequately considered its ability to execute the new obligations, and which ongoing programs it would cut to obtain the necessary personnel and funds.

The proposed regulations would likely cause significant foreign policy problems for the United States. In the first place, another sovereign country within whose territorial jurisdiction a proposed Federal action is to occur will have already determined that the proposed action is in its national interest, taking into account a range of considerations and its own priorities. There is very likely to be serious resentment by the foreign country if the ability of the United States to participate in such an action is negated, delayed, or made more expensive as a result of requirements imposed extraterritorially by U.S. law. This resentment can spill over into other aspects of the bilateral relationship, to the detriment of the overall interests of the United States. In more specific terms, fulfillment of the many requirements envisaged in the proposed regulations would be incompatible with the requirements of effective diplomacy, such as flexibility, timeliness, mutuality, and, in some cases, confidentiality. The proposed regulations could result in lost exports financed by the Export-Import Bank and foregone overseas investments supported by the Overseas Private Investment Corporation. The consequences would be reduced income and employment in the United States, decreased international competitiveness of U.S. business, and a worsened balance of payments. AID projects could be delayed or made more expensive. This would involve costs to the U.S. taxpayer and also to the needy persons in developing countries who are the beneficiaries of AID projects. The harmful impact on beneficiaries would be magnified if delay in the U.S. portion of a multilateral project caused the entire, larger project to be postponed. Finally, the proposed regulations could create serious difficulty for the State Department in the negotiation of international agreements. It is essential that the Department retain the flexibility to negotiate successfully

issues which may be of great political importance, especially in situations in which time is of the essence.

It is for reasons such as the above that the Department of State is strongly opposed to the proposed regulations in their present form. However, as we have said many times before, the Department remains committed to the furtherance of U.S. international wildlife conservation goals in a manner consistent with overall U.S. foreign policy interests. Section 8 of the Endangered Species Act, in particular Section 8(c), gives broad authority to the Interior Department to cooperate with foreign countries in conservation programs, through or in consultation with the Secretary of State. We believe that such a cooperative approach is consistent with the intent of Congress and can be carried out in a manner which is fully compatible with overall U.S. foreign policy interests. Further, we believe such an approach would be more effective in furthering the objectives of the Act than the approach you envisage under Section 7, because the Section 8 approach would encourage country-wide consideration of endangered species problems, whereas the Section 7 approach would be project-specific and limited only to actions involving U.S. Federal agencies. We would encourage Interior to expand its activities under Section 8, and we will be pleased to facilitate such a cooperative approach.

However, to reiterate, the Department of State strongly believes that the proposed regulations must be redrafted to make clear that they do not apply to Federal agency actions having effects on the high seas or in foreign countries. I urge your Department to act accordingly.

Sincerely,

/s/ [Illegible Signature]

for JAMES L. MALONE
Designate

Attachment:
As stated.

EXPORT-IMPORT BANK OF
THE UNITED STATES
Washington, D.C. 20571

OFFICE OF THE GENERAL COUNSEL

April 22, 1981

G. Ray Arnett
Assistant Secretary-Designate
for Fish and Wildlife and Parks
U.S. Department of the Interior
Washington, D.C. 20240

Dear Mr. Arnett:

This is in response to the memorandum from Dr. F. Eugene Hester, Acting Director, Fish and Wildlife Service, dated February 24, 1981, requesting the comments of Federal agencies on revised draft proposed regulations governing interagency consultations pursuant to Section 7 of the Endangered Species Act of 1973, as amended (the "Act").

We have limited our comments to the extraterritorial application of Section 7 of the Act by the draft regulations. Based on our review of the plain language of Section 7 as well as the legislative history of the Act, we have concluded that Section 7 does not apply extra-territorially to protect foreign endangered or threatened species from actions by Federal agencies. Furthermore, to the extent that the draft regulations are applied extraterritorially, they are invalid and should be amended accordingly. The Bank, along with the Department of State, has consistently maintained this position since the time that Section 7 regulations were first promulgated.

Our conclusion is based on the fundamental and long-standing rule of statutory construction that a statute is presumed to apply only within the United States unless a clear expression of Congressional intent is expressed to the contrary. Applying this rule to Section 7, it is apparent that not only is any clear expression of extraterritorial application absent, but also other sections of the Act clearly state a Congressional intention to promote bilateral and multilateral approaches to protect endangered or threatened species on a global level.

As a practical matter, the application of Section 7 extraterritorially would have a significant adverse impact on the ability of the Bank to meet its statutory objective of facilitating U.S. exports by providing financing to foreign purchasers of U.S. goods and services. In a world where competition among suppliers has become extraordinarily intense and financing is frequently the decisive factor in determining an export sale, Eximbank must be able to act as expeditiously as possible in determining whether to make its financial assistance available. Implementation of the draft regulations would necessitate long delays by the Bank in reviewing applications for financing with the net result being a loss of sales by U.S. exporters without any concomitant benefit of protecting foreign endangered or threatened species.

Moreover, the unilateral imposition of U.S. standards by the Bank would be perceived by foreign nations as an infringement of their national sovereignty, while at the same time calling into question the reliability of the United States as a supplier of much needed goods and services. Congress clearly expressed its awareness of this possibility by limiting U.S. efforts to protect foreign species to bilateral and multilateral approaches which encourage international cooperation.

Finally, the extraterritorial effect of the draft regulations runs counter to the important Administration objective, as stated in Executive Order 12291, of minimizing regulatory burdens on the economy of the United States. The draft regulations would also constitute a major rule under Executive Order 12291, since they are likely to result in a significant adverse effect on the ability of U.S. companies to compete in export markets and since their annual effect on the U.S. economy based on lost export sales is likely to be in excess of 100 million dollars.

We suggest that the draft regulations be considered further within the Administration, in order to determine how best to revise the regulations in a manner consistent with our comments.

Sincerely,

/s/ Warren W. Glick

WARREN W. GLICK
General Counsel

UNITED STATES INTERNATIONAL DEVELOPMENT
COOPERATION AGENCY
AGENCY FOR INTERNATIONAL DEVELOPMENT
Washington, D.C. 20523

ASSISTANT ADMINISTRATOR

April 23, 1981

Mr. G. Ray Arnett
Assistant Secretary Designate
for Fish and Wildlife and Parks
Department of the Interior
Washington, D.C. 20240

Dear Mr. Arnett:

In a letter dated February 24, 1981 from Dr. F. Eugene Hester, Acting Director of the Fish and Wildlife Service (FWS), the Agency for International Development (AID) was given the opportunity to comment on draft regulations recently proposed by FWS and the National Marine Fisheries Service. These Draft proposed regulations purport to amend the existing regulations regarding section 7 of the Endangered Species Act (ESA) to conform to the 1978 and 1979 amendments to that section.

On prior occasions involving the issue of the applicability of section 7 to the assistance activities financed by this Agency in less developed countries, we have expressed the view, in concurrence with the Department of State, that section 7 was not intended to have such extraterritorial effect. Copies of the letters containing the most recent statements of these views and those of the Department of State are enclosed. (TAB A). We continue to adhere to the views expressed therein.

We believe that the Draft proposed regulations, to the extent they are made applicable to foreign assistance activities in less developed countries, ignore the sensitive foreign policy considerations that are involved. The countries in which AID-financed development activities occur have their own priorities and values and seek to make their own choices regarding particular programs and their effects. No foreign assistance program could be effectively conducted that is prevented, by these regulations, from affording to the assisted countries' own national interests the careful consideration they deserve. In the absence of an unequivocal mandate from the Congress, we do not consider that the Draft proposed regulations can properly regulate the protection of endangered or threatened species in foreign countries in connection with assistance activities carried out at their request. In addition, we feel that the Draft proposed regulations would create significant additional administrative burdens and related costs and would cause unacceptable delays in the conduct of foreign assistance activities.

Although we do not believe that section 7 of the ESA applies to AID's overseas activities, we are, nevertheless, concerned about the plight of endangered or threatened species and their critical habitats in foreign countries. Our concern is expressed in AID's environmental regulations, which were amended on October 9, 1980, to include a separate section addressing this issue. Pursuant to this new section, a specific determination is made as to whether a proposed project, program or activity will effect endangered or threatened species or critical habitat. Whenever it is determined that such adverse effects will occur, an Environmental Assessment or EIS is completed that involves a discussion of the alternatives or modifications necessary to avoid or mitigate the adverse effects. The AID regulations permit full deference to be accorded to the views

of the developing country while also assuring the avoidance or mitigation of harm. AID routinely includes information available through FWS on endangered species in the environmental profiles of AID-assisted countries. These profiles become the basis for more in-depth studies of environment/natural resource issues. These latter studies are conducted with host country personnel.

In short, we do not believe that the requirements of section 7 apply to our overseas activities. However, our procedures are designed to protect endangered or threatened species and their critical habitat, with due attention to applicable foreign policy constraints. We therefore strongly urge that the Draft proposed regulations be redrafted to clarify that they are not applicable to federal agency activities having effects on the high seas or in foreign countries.

Sincerely yours,

/s/ Charles Paolillo

CHARLES PAOLILLO
Acting Assistant Administrator
for Program and Policy

UNITED STATES
NUCLEAR REGULATORY COMMISSION
Washington, D.C. 20555

Apr. 24, 1981

Mr. Eugene Hester, Acting Director
Office of Endangered Species
U.S. Fish and Wildlife Service
Washington, D.C. 20240

Dear Mr. Hester:

Subject: FWSIOES

We have reviewed the Section 7 revised draft proposed regulations which you sent us on February 24, 1981. Our comments are provided in the enclosure.

Sincerely,

/s/ Wm. H. Regan, Jr.

for DANIEL R. MULLER, Assistant
Director for Environmental
Technology
Division of Engineering
Office of Nuclear Reactor
Regulation

Enclosure:
Comments

THE NUCLEAR REGULATORY COMMISSION'S COMMENTS ON FWS AND NMFS PROPOSED SECTION 7 REGULATION DATED FEBRUARY 24, 1981

1. "A biological assessment may require a federal agency to conduct research or point out the need for research." (p. 8)

We have problems with this statement as presently worded. First, the assessment imposes no requirement; only the statute imposes requirements. Second, the requirement imposed by the statute is to "use the best scientific and commercial data available". While the assessment must be designed to identify species likely to be affected, the law does not contemplate that agencies carry out comprehensive research programs or detailed field studies in order to discharge their biological assessment obligations.

2. The terms "biological assessments", "construction" and "designated non-Federal representative". (p. 8)

These terms should be defined, or at least explained in the preamble.

3. The middle paragraph of p. 9.

The NRC retains responsibility over nuclear power plants and uranium mills for their lifetime (30+ years). During this time, modifications are made which are neither "major actions nor do they significantly affeet the human environment". The Service normally lists species occurrence simply by States.

In order for an agency to expeditiously comply with this regulation, we recommend that the Service supply additional information besides the state(s) in which the species occurs, e.g. counties in which the species occurs, and the species' usual or preferred habitat.

4. S. 402.02 Definitions (p. 26)

We question the premise that the Endangered Species Act applies to agency licensing actions involving exports to foreign countries. Even if there are some agency actions to which the Endangered Species Act applies, the broad assertion that the law extends to all U.S. governmental activities in foreign countries (if that is the meaning of the definition of "action" in 402.02) is incorrect. At least insofar as exports under the Atomic Energy Act of 1954, as amended, and the Nuclear Non-Proliferation Act of 1978, are concerned, the Endangered Species Act must be deemed not to have extraterritorial application.

UNITED STATES DEPARTMENT OF COMMERCE
INTERNATIONAL TRADE ADMINISTRATION
Washington, D.C. 20230

April 29, 1981

Mr. G. Ray Arnett
Assistant Secretary-Designate
for Fish and Wildlife and Parks
U.S. Department of the Interior
Washington, D.C. 20240

Dear Mr. Arnett:

This is in response to the memorandum of February 24, 1981 from Dr. F. Eugene Hester, Acting Director, Fish and Wildlife Service, requesting views from Federal agencies on revised draft proposed regulations which amend Section 7 of the Endangered Species Act of 1973, as amended.

After careful review of the draft regulations, I wish to advise you that the International Trade Administration opposes the amendments to Section 7 which govern the consultation process. We are particularly concerned with the extra-territorial application of consultative procedures to the actions of Federal agencies because it would have a serious adverse impact on Department of Commerce efforts to promote exports overseas and impede the competitive viability of U.S. companies. Furthermore, there is no apparent statutory or legislative basis for this extension beyond U.S. limits.

As we understand it, the consultative procedure would be very costly and time consuming. The timeliness, flexibility, and confidentiality so important in business dealings could be seriously undermined.

We also believe that the proposed amendments to the Act constitute a "major rule" under Executive Order 12291 of February 17, 1981 since they could result in a significant adverse effect on competition, employment, investment, and the ability of U.S. firms to compete overseas. On this basis we request that a regulatory impact analysis be prepared.

We suggest that the draft regulations be revised to incorporate the information obtained from the regulatory impact analysis as well as the responses of all concerned Federal agencies.

Sincerely,

/s/ Franklin J. Vargo

FRANKLIN J. VARGO,
Acting Assistant Secretary for
International Economic Policy

COMMENTS OF THE US ARMY CORPS OF ENGINEERS (CIVIL WORKS) ON THE DRAFT PROPOSED REGULATIONS ON INTERAGENCY COOPERATION, ENDANGERED SPECIES ACT

GENERAL COMMENTS

1. The U.S. Army Corps of Engineers (Civil Works) understands and supports the various important responsibilities which the many sections of the Endangered Species Act of 1973, as amended, give to the Departments of the Interior and Commerce, and specifically to the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). Nevertheless, *Section 7* of that Act, as amended, grants limited and precisely–defined authorities to the Interior and Commerce Departments. To summarize, Section 7 authorizes the Secretary of the Interior or Commerce, as appropriate, *to consult* with other Federal agencies; otherwise to *assist* said agencies to carryout *those other Federal agencies'* responsibilities to implement the substantive mandates of Section 7; to designate critical habitat for endangered and threatened species; and to prepare "biological opinions" when appropriate. The plain language of Section 7 clearly directs that Section's substantive commands to each and every Federal agency, as follows:

> "*Each Federal agency shall,* in *consultation* with and with the *assistance* of the Secretary, *insure* that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of (critical) habitat . . ."

2. The Departments of the Interior and Commerce themselves have recognized that Section 7 vests in Federal

"action agencies" the primary responsibility for implementing Section 7's substantive commands. For example, the presently-effective version of the Interior/Commerce regulation on interagency cooperation states that:

> "Responsibilities after consultation. Upon receipt and consideration of the biological opinion and recommendations of the Service, it is the responsibility of the Federal agency to determine whether to proceed with the activity or program as planned in light of its Section 7 obligations." (50 CFR Sec. 402.04 (g))

The U.S. Circuit Court of Appeals for the Eighth Circuit stated the same conclusion in *Sierra Club v. Froehlke*, 534 F. 2d 1289 (8th Cir., 1976) as follows:

> "The plaintiffs urge a violation of Section 7, *supra*, requiring that all federal agencies act 'in consultation with and with the assistance' of the Secretary of the Interior on the ground that defendants have ignored

* * * * *

27. *Page 26, Section 402.02.*

a. The proposed definitions of "action" would continue an unsubstantiated and not-legally-authorized assertion which now appears in 50 CFR Section 402.01: i.e., that Section 7 restricts the activities of Federal agencies within the territorial jurisdiction of foreign countries. The Memorandum Opinion of the Assistant Solicitor for Fish and Wildlife, Office of the Solicitor, U.S. Department of the Interior, dated February 13, 1976, presents much of the evidence (e.g., from legislative history) which indicates that Congress did not intend Section 7 to apply to the territory of foreign nations. Even though that Solicitor's opinion concludes that Interior and Commerce should not attempt to designate critical habitat in foreign states, the evidence presented in the opinion demonstrates that the entirety of Section 7 applies to United States territory, not to foreign countries. By analogy, the holding and reasoning of the U.S. Circuit Court of Appeals for the Fifth Circuit in *U.S. v. Mitchell* (553 F. 2d 966, 5th Cir. 1977) supports the conclusion that no part of Section 7 applies to the activities of the United States Government agencies on the lands or territorial seas of foreign sovereignties. An overseas mission of the U.S. Army Corps of Engineers provides a case example demonstrating why the terms of Section 7 should not be stretched to control U.S. Government activities in foreign nations. The Corps of Engineers serves as the contracting/engineering/construction agent for large-scale "nation-building" programs in Saudi Arabia thereby serving U.S. diplomatic and economic interests. If the Saudi Government chooses to build a facility on a given site, the Corps could not reasonably or appropriately interfere with that decision because some endangered species might be disturbed (unless, of course, the Saudi Government were to instruct the Corps to protect

the species). In addition, U.S. national defense activities abroad could be seriously hampered if U.S. agencies must act to protect endangered species for which the host foreign government has no concern or regard.

b. The proposed definition of "jeopardize the continued existence of" contains a number of ambiguities. More importantly, that expression is used in Section 7's language addressed to all Federal agencies; consequently, the Departments of Interior and Commerce should not attempt to establish their definition in a regulation controlling all other Federal agencies. For example, the proposed definition of "jeopardize the continued existence of" would have the effect of forbidding any Federal action which "would be expected directly or indirectly to reduce appreciably the likelihood of the . . . *recovery* of listed species in the wild . . ." (emphasis added). "Recovery" is defined to mean "improvement in the status of listed species to the point at which listing is no longer required." These definitions could be construed to set aside vast areas of lands and waters not currently used by a species (e.g., the grizzly bear in the lower 48 states), and not likely to be used by that species in the near future, but which *could* be used by the species for "recovery" at some time in the most distant future. We are not convinced that the Act requires that Federal actions and permits be precluded for the large areas of real estate which could be affected by such an interpretation.

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

Aug. 31, 1981

Memorandum

To: Assistant Secretary, Fish and Wildlife and Parks

From: Associate Solicitor, Conservation and Wildlife

Subject: Overseas Application of Section 7 of the Endangered Species Act

This memorandum is in response to your request to determine whether Section 7 of the Endangered Species Act (Act or ESA) has international application.

Introduction

Section 7 of the Endangered Species Act of 1973, as amended, 16 U.S.C. § 1536, provides in pertinent part:

> Each federal agency shall, in consultation with and with the assistance of the Secretary insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each

> agency shall use the best scientific and commercial data available.

ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2).

The prohibitions of Section 7 can be divided into two separate parts: the "jeopardy" clause and the "critical habitat" clause. In past opinions and regulations of the Department of the Interior these two clauses have been interpreted in the following manner. The jeopardy clause has been applied to all federal agency actions including those occurring on the high seas and in foreign countries, as well as those within the United States.[1] Whereas, because the critical habitat clause specifically requires "consultation with the affected states," it has been interpreted as not applying to foreign countries.[2]

In view of this dichotomy in interpreting the two clauses, the regulation presently implementing the jeopardy clause reads, in pertinent part:

> Section 7 (16 U.S.C. 1536) applies to all listed species of fish, wildlife, or plants. . . . [I]t requires every Federal agency to insure that its activities or programs in the United States, *upon the high seas, and in foreign countries,* will not jeopardize the continued existence of a listed species. . . .

50 C.F.R. § 402.01 (emphasis added).

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[1] Memorandum on Federal Activities Jeopardizing Foreign Species from Associate Solicitor, Conservation and Wildlife to Director, Fish and Wildlife Service (April 12, 1977).

[2] Memorandum on Designating Critical Habitat for Foreign Species from Assistant Solicitor, Fish and Wildlife to Associate Director, Federal Assistance, Fish and Wildlife Service (February 13, 1976). The United States District Court for the District of Colorado, however recently held that the Act does require designation of critical habitat in foreign countries. *Colorado River Water Conservation District v. Andrus,* Civil No. 78-A-1191 (August 3, 1981). This is contrary to the traditional position of this Department. The judgment is not final in the case, but the Department intends to appeal this holding when it is.

The controversy surrounding this regulation and its interpretation of the responsibilities under the jeopardy clause involves the emphasized language extending the reach of the statute to foreign countries and the high seas.

Conclusion

Upon re-examining the relevant arguments on the major issues in this matter, we now conclude that the jeopardy clause of Section 7 does not apply to federal actions which occur within a foreign country. For jurisdictional reasons discussed later in this opinion, we take no position on whether Section 7 applies to the high seas. We do conclude, however, that Section 7 does apply to federal agency actions on the Outer Continental Shelf. All previous legal opinions of this Department which reached a contrary conclusion are hereby withdrawn.

Discussion

Section 7 requires, among other things, that all federal agencies insure that their actions will not jeopardize the continued existence of endangered or threatened species. In order to achieve this objective, the Act requires consultation between the Secretary of the Interior and the agency whose actions may affect an endangered or threatened species.

The consultation process involves three steps. First, the agency determines whether its proposed action "may affect" a protected species. If it may, consultation between FWS, and the agency must be initiated.

After discussion and review, the FWS issues a written statement to the Federal agency concerned, setting forth the Service's biological opinion on whether the proposed action is or is not likely to jeopardize the continued existence of the species. If the decision is that there is no like-

lihood of jeopardy, then the Agency's consultation requirement has been completed. If, however, the Service concludes that the proposed action is likely to jeopardize the species, the Service is to suggest reasonable and prudent alternatives which it believes would not jeopardize the species and could be taken by the federal agency.

Federal Actions in Foreign Countries

We conclude that the Section 7 consultation process does not apply to federal agency actions in foreign countries. In support of our conclusion, we look first to the express language of the statute and the general rules of statutory construction. Although the jeopardy clause itself did not originally contain and was not amended in 1978 and 1979 to include an express reference to "affected states," as is contained in the critical habitat clause, other amendments to Section 7 do support the conclusion that the jeopardy clause does not apply to federal agency actions in foreign countries. These amendments address primarily the exemption process whereby an agency action may be approved even though it would jeopardize a protected species. Since this exemption process fails to expressly reflect the possibility that an exemption may be necessary for a federal action in a foreign country, it supports the proposition that the jeopardy clause was not intended to apply to federal actions in foreign countries.

In addition to the express language of the statute, the legislative history of the 1978 and 1979 amendments establishing the exemption process indicates that Congress was focusing on the effect federal agency actions would have within areas under the jurisdiction of the United States. For example, the Conference Report on the 1978 amendments states:

> Under the new Section 7, a Federal agency, the Governor of a state where the agency actions, species,

> and critical habitat are located, or an individual seeking a permit or license, may submit to the Secretary an application for an exemption. . . . Upon receipt of the application, the Secretary must promptly notify the Governor or Governors of any affected State(s) and submit the application of the review board.
>
> The review board will consist of three members: one appointed by the Secretary, one appointed by the President after consideration of the recommendations from the Governor(s), of the affected State(s), and an administrative law judge.

H.R. Rep. No. 1804, 95th Cong., 2d Sess. 19 (1978).

After making their initial determination, the review board submits their report to the Endangered Species Committee, as established in section (7)(e), 16 U.S.C. § 1536(e). The Committee is composed of the following seven members: the Secretaries of the Interior, Army, and Agriculture; the Administrators of NOAA and EPA; the Chairman of the Council of Economic Advisers; and a person appointed by the President upon recommendation of the Governor(s) of the affected State(s). Originally, the Senate bill included the Governor of the State on the panel, but at conference the House's version was adopted allowing for appointment of a representative of the Governor.

The reasons for the inclusion of a State representative was explained in the Senate Report as follows:

> [T]here was a perceived need to have someone on the Endangered Species Committee who is in touch with and understands the needs and desires of those persons close to or dependent on the Federal activities which would be the subject of the exemption application.

S. Rep. No. 874, 95th Cong., 2d Sess. 5 (1978).

This language clearly reflects Congressional sentivity for soliciting the views and opinions of the Chief Executives of the States to be affected by the impact of Section 7 on a given project. If Congress was so solicitous of the jurisdictional prerogatives of the governors of this nation, it should not be presumed that it was any less sensitive to the sovereign prerogatives of the rulers of foreign countries. That is, if Congress intended to require that Section 7 be applied to federal actions in foreign countries, it would have inserted some provision allowing for the Secretary of State[3] or representatives of the affected foreign countries to be on these panels. Instead, membership on both the review board and Endangered Species Committee is domestically-oriented.

Furthermore, in those sections of the ESA which were clearly intended to apply to foreign countries, Congress either expressly required consideration of the programs and policies of the affected foreign nations or mandated the involvement of the Secretary of State. See 16 U.S.C. 1533(b)(2) and 16 U.S.C. § 1538.

While recognizing the inherent risks associated with determining Congressional intent through Congressional silence, any ambiguity on the issue of the application of Section 7 to foreign countries is resolved upon the consideration of various foreign policy concerns.

First of all, the consultation procedures under Section 7 would undoubtedly cause significant delays in administer-

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[3] Section 7(i), 16 U.S.C. § 1536(i) provides a procedure whereby the Secretary of State may prohibit the consideration of an application for an exemption if such exemption and proposed action would be in violation of an international treaty obligation or other international obligation of the United States. We do not believe that this indicates an intent to apply Section 7 to federal agency actions in foreign countries. Rather, this provision is triggered whenever a federal agency action within the United States involves international treaty obligations.

ing assistance activities in foreign countries and would severely hamper the flexibility and responsiveness of American diplomacy abroad. Nor could the consultation process insure confidentiality which is often a prerequisite to foreign policy initiatives, intelligence operations or military assistance.

There is also the problem of foreign sovereignty considerations. The consultation and exemption process does not establish procedures for considering and deferring to the views of foreign governments with respect to their own development priorities, or plans for fish and wildlife conservation in their own countries.

For all of the above reasons, therefore, we conclude that the jeopardy prohibition under Section 7 does not apply to federal agency activities within foreign countries.

Federal Agency Actions on the High Seas Beyond the Outer Continental Shelf

Under the division of jurisdiction set forth in the Endangered Species Act, 10 U.S.C. § 1532(10),[4] the Department of Commerce has the primary responsibility for the conservation of marine species which live upon the high seas beyond the Outer Continental Shelf (OCS). Thus, if

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[4] Pursuant to the Reorganization Plan No. 4 of 1970, 5 U.S.C. app. (1976), the Director of the U S. Fish and Wildlife Service and the Director of the National Marine Fisheries Service, signed a Memorandum of Understanding which divided jurisdictional responsibilities under the Endangered Species Act. *See* Memorandum of Understanding Between the U.S. Fish and Wildlife Service, United States Department of the Interior and the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, United States Department of Commerce Regarding Jurisdictional Responsibilities and Listing Procedures Under the Endangered Species Act of 1973 (signed August 28, 1974 by Robert W. Schoning, Director, NMFS and Lynn A. Greenwalt, Director, FWS).

Section 7 has any application at all on the high seas, federal agencies would consult with the Department of Commerce and not the Department of the Interior. We, therefore, have no need to decide whether Section 7 applies to federal agency actions on the high seas beyond the OCS.

Federal Agency Actions on the Outer Continental Shelf

Section 4(a)(1) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(1), generally extends the laws of the United States to the OCS. One such law is the Endangered Species Act. Thus Section 7 applies to federal agency actions on the OCS.

Unlike the situation involving federal agency actions on the high seas beyond the OCS, agency actions on the OCS could impact listed species under the jurisdiction of the Department of the Interior. For example, in the case of OCS Lease Sale #53, BLM consulted with the Fish and Wildlife Service over the potential impact of the sale on the California Sea Otter.

The application of Section 7 to Federal agency activities on the OCS has also been the subject of recent litigation involving oil and gas leasing activities. *See Conservation Law Foundation v. Andrus,* 623 F. 2d 712 (1st Cir. 1979); *North Slope Borough v. Andrus,* 486 F. Supp. 332 (D.D.C.), *aff'd in part,* and *rev'd in part,* 642 F. 2d 589 (D.C. Cir. 1980); *State of California, et al. v. Watt, et al.* No. 81-2080 NRP (C.D. Cal. Aug. 18, 1981). In these cases, the Government argued that it had complied with all of the procedural and substantive requirements of Section 7 as they related to various oil and gas leasing proposals.

We believe, therefore, that the application of Section 7 to federal actions on the OCS is well established.

/s/ J. Roy Spradley, Jr.
J. ROY SPRADLEY, JR.

cc: Director, USFWS
General Counsel, NOAH, Department of Commerce
Department of State, OES/ENR,
Attention: George Furness, Wildlife Officer

bcc: Solicitor Docket
Div Chron File (2)
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SOL FW Files
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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. 3-86-757 (MN)

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS

v.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANTS

ALLEGATIONS BY PARAGRAPH NUMBER IN FIRST AMENDED COMPLAINT	ADMISSIONS IN ANSWER OF DEFENDANT SECRETARY
¶6. Defendant Hodel is Secretary of Department of Interior. He is charged with implementation of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*	Defendant admits he is Secretary of Interior and that he is primarily responsible for implementation of the Endangered Species Act (ESA) with regard to those species under the jurisdiction of the Department of Interior.
¶10. In addition, there are both endangered and threatened species with ranges that span United States and foreign borders.	As of November 1, 1988, 1035 species were listed as endangered or threatened, including 576 species that range outside the United States.

ALLEGATIONS BY PARAGRAPH NUMBER IN FIRST AMENDED COMPLAINT	ADMISSIONS IN ANSWER OF DEFENDANT SECRETARY
¶11. The Secretary has listed and continues to list species whose primary range is outside the United States.	Defendant admits that species whose primary range is outside the United States have been and will be listed as appropriate pursuant to the requirements of Section 4 of the ESA.
¶16. Shortly after passage of the Act in 1973, a series of consultations within the Department of Interior and among Interior and other Federal departments and agencies began. The purpose of these discussions was to outline the requirements Section 7 imposed on Federal agencies and departments.	Defendant admits there were discussions among the various agencies concerning the requirements of the ESA.
¶17. The Fish and Wildlife Service (FWS) was designated the lead agency within the Department of Interior for formulating regulations to implement Section 7.	Defendant admits the Fish and Wildlife Service (FWS) was designated the lead agency for the formulation of regulations concerning section 7 of the ESA.

ALLEGATIONS BY PARAGRAPH NUMBER IN FIRST AMENDED COMPLAINT	ADMISSIONS IN ANSWER OF DEFENDANT SECRETARY
¶18. On April 22, 1976, "Guidelines to Assist the Federal Agencies in complying with Section 7 of the Endangered Species Act of 1973" were transmitted to all Federal agencies by the Fish and Wildlife Service. After revision of these Guidelines based on Federal agency comments, the FWS issued a Notice of Proposed Rulemaking on January 26, 1977. 42 Fed. Reg. 4868 (1977).	Admits
¶21. The proposed rules received extensive comment and led to final rulemaking on January 4, 1978. 43 Fed. Reg. 870 (1978) (the 1978 rule).	Admits
¶22. The final rulemaking retained in full the provision of the proposed rule applying Section 7 requirements	Admits

ALLEGATIONS BY PARAGRAPH NUMBER IN FIRST AMENDED COMPLAINT		ADMISSIONS IN ANSWER OF DEFENDANT SECRETARY
	to Federal agency actions occurring in foreign countries. 50 C.F.R. § 402.02, 43 Fed. Reg. at 874 (1978).	
¶23.	Congress in 1978 amended the Act, Nov. 10, 1978, P.L. 95-632, § 3, 92 Stat. 3752. In so doing Section 7 was lengthened considerably.	Admits
¶24.	On June 29, 1983, the Fish and Wildlife Service published a Notice of Proposed Rulemaking to revise 50 C.F.R. Part 402. 48 Fed. Reg. 29990 (1983).	Admits
¶26.	The effect of these proposed changes was to deny to species listed by the Fish and Wildlife Service pursuant to Section 4 of the Act whose primary range is outside the United States the protection those species	Admitted through lack of response pursuant to Fed. R. Civ. P. 8(d).

ALLEGATIONS BY PARAGRAPH NUMBER IN FIRST AMENDED COMPLAINT	ADMISSIONS IN ANSWER OF DEFENDANT SECRETARY
had received both under the 1978 rule and the Act.	
¶27. Several commenters, including Defenders of Wildlife, asserted that the rule should continue to apply to agency actions occurring in foreign countries. In addition, an Interagenc Task Force formed pursuant to the International Environment Protection Act of 1983, 22 USC § 2151q, cited Section 7(a)(2) of the Endangered Species Act in recommending that Federal agencies "should continue to adopt policies withholding support for certain types of projects that degrade or destroy fragile or protected lands" in foreign nations.	Admits

ALLEGATIONS BY PARAGRAPH NUMBER IN FIRST AMENDED COMPLAINT		ADMISSIONS IN ANSWER OF DEFENDANT SECRETARY
¶28.	On June 3, 1986, FWS published a final rule revising the 1978 rule. 50 C.F.R. Part 402, 51 Fed. Reg. 19926 (1986) (the 1986 rule).	Admits
¶29	In response to the comments on the proposed rule, FWS retained that portion of the 1978 rule applying Section 7 to Federal agency actions on the high seas. The 1986 rule rescinded that portion of the 1978 rule which applied the consultation requirements of Section 7 to Federal agency actions in foreign nations. The definition of "action" in the 1986 rule likewise purported to limit the applicability of Section 7's consultation requirement to agency actions occuring in the United States or on the high seas.	Admits

ALLEGATIONS BY PARAGRAPH NUMBER IN FIRST AMENDED COMPLAINT	ADMISSIONS IN ANSWER OF DEFENDANT SECRETARY
¶31. FWS will continue to list species whose primary range is found outside of United States jurisdiction when those species are determined to be endangered or threatened pursuant to Section 4 of the Act.	Admits
¶36. Issuance of the aforesaid 1986 rule, 50 C.F.R. Part 402, 51 Fed. Reg. 19926 (1986), constitutes a final agency action.	Defendant admits that the rule announced at 51 Fed. Reg. 19926 (June 3, 1986) is a final agency action.

DEPOSITION TESTIMONY OF JUDY M. BELLAIRS

December 14, 1988

Testimony Regarding Deponent's Personal and Professional Interest In Endangered Species Conservation

Questioned by Mr. Shockey:

Q. Why don't you go ahead and state what your current job is and what your job responsibilities include.

A. I'm currently the legislative director of the Minnesota Chapter of the Sierra Club. My duties include lobbying and development of legislative issues for the Chapter.

Q. And how long have you held that position with the Minnesota Chapter of the Sierra Club?

A. I have been legislative director for about a year.

Q. Before that where did you work?

A. I had a previous position with the Sierra Club as more or less an office manager.

Q. For how long?

A. That was the previous six months to my becoming legislative director.

Q. Were you previously employed by an organization known as Friends of Animals and Their Environment?

A. I was a volunteer.

Q. What was your position as a volunteer with that organization?

A. I was one of the issues coordinators.

Q. And what are the responsibilities for that position?

A. To research and develop issues, wildlife issues.

Tr. at 5-6.

Q. In connection with your volunteer work for FATE, did any of that work relate to endangered and threatened species life?

A. Yes.

Q. Does that organization concern itself with wildlife generally or only more specifically with endangered and threatened species?

A. With all types of wildlife including endangered species . . . .

Q. And when did you begin your volunteer work for FATE?

A Probably 1984 or '85.

Tr. at 10-11.

Q. Is that the express purpose of [FATE], to protect endangered and threatened species?

A. Well, I know for a fact they have worked on protection of endangered and threatened species.

Tr. at 19.

Testimony Regarding The Efficacy Of The Section 7 Consultation Process

Questioned by Mr. Shockey:

Q. Do you know if the Endangered Species Act refers to actions in other nations that involve an agency of the federal government?

A. My understanding is that the consultation requirement does refer to agency action.

Tr. at 17.

Q. You stated a couple moments ago that you believe there could be some [e]ffect on your enjoyment of endangered species in the Minnesota Zoo as a result of the Secretary's regulation. What do you think that [e]ffect could be?

A. Failure to consult might deplete populations of threatened and endangered species thereby making them more difficult to obtain for zoos.

Q. If consultation ocurred, could the Secretary prohibit that project in another country from going ahead?

A. My understanding is that he could not prevent it; however, I believe the consultation process is important because it makes information available.

Tr. at 25-26.

Testimony Regarding Deponent's Familiarity With This Action

Questioned by Mr. Shockey:

Q. Do you have an understanding of the nature of this lawsuit involving consultation and the Endangered Species Act?

A. I have a general understanding.

Q. What is that understanding?

A. That Section 7 of the Endangered Species Act requires agencies to consult with the Fish and Wildlife Service on projects in foreign countries that may impact on threatened and endangered species.

Q. And was that understanding derived from your own review of documents or some other source of information?

A. I don't specifically recall reviewing documents. When the lawsuit was initiated and I did my affidavit, I learned of the subject of the lawsuit.

Tr. at 8-9.

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DEPOSITION TESTIMONY OF JOHN M. FITZGERALD

December 19, 1988

Testimony Regarding Deponent's Personal and Professional Interest In Endangered Species Conservation

Questioned by Ms. Kolker:

Q. Has anything in that first three paragraphs changed? Are you still a member of Defenders of Wildlife?

A. I am. My title has changed.

Q. Your title is now?

A. Counsel for wildlife policy.

Q. And have your duties been changed substantially?

A. My duties expanded to include not only the endangered wildlife program, but be of assistance to the other programs and our issues campaigns.

Tr. at 6.

Q. When was the last time you went to the zoo?

A. About two or three months ago.

Q. Which zoo?

A. National zoo.

Q. Do you go there frequently?

A. Fairly frequently, yes.

Q. Which is defined as?

A. Probably about four or five times a year.

Q. Does the National Zoo have endangered species on exhibit?

A. Yes.

Q. Which species?

A. A whole list of them.

Q. Any in which you are particularly interested?

A. I believe they have both Asian and African elephants, the great apes, the golden lion tarmarin I believe is one of their favorite they are working on trying to restore

those to the wild, if I am not mistaken. Those come from Brazil. Tiger. You can go on and on. Many of the species in the zoo are endangered and threatened.

Q. In paragraph 5 of the affidavit you identified earlier, you said what you have enjoyed in zoos and on films, I am paraphrasing but the affidavit is part of the record, that will be harmed by U.S. agency actions described herein. Which agency actions were you referring to?

A. Okay. A lot of different agency actions, but, for example, if the Mahaweli project in Sri Lanka is completed, as I understand it is not yet completed, if it is, as it proceeds, it will almost undoubtedly have an impact, and will probably harm the Asian elephant population which is endangered there. The various dams in India, like the Normada River Valley project will harm Asian elephants. I think 35,000 square miles, a substantial amount of teak forest habitat that the Asian elephants live in and work in, will be flooded out by that project, which I believe will be funded by the U.S. Treasury Department through the World Bank. There have been a number of dams proposed in Thailand, covered in Defenders Magazine, which will harm the Asian elephant, again multi-lateral bank projects funded by U.S. agencies and approved by their votes.

Q. Do you understand the World Bank to be a Federal agency?...

A. The U.S. agency, Treasury Department, that is, has a tremendous influence on the World Bank and its projects, as they are developed and carried out.

Tr. at 20-22.

Testimony Regarding Deponent's Relevant Activities Since Affidavit Filed In November 1986

Questioned by Ms. Kolker:

Q. Have you personally traveled abroad this year?

A. Yes.

Q. To what countries?

A. Argentina—this is '88, isn't it?

Q. Yes.

A. Argentina.

Q. I gather, from your checking the year, you traveled in '87 as well?

A. Yes.

Q. To?

A. Canada...

Q. Were either of these trips related to your duties with the Defenders of Wildlife?

A. Yes. The '87 trip was to be Defenders' representative, official representative as on ongoing member organization to the Conference of the Parties to the Convention on International Trade in Endangered Species...

Q. And in 1988, in Argentina, was that related to your duties?

A. Related, yes. It wasn't required, but I chose to go there, but the wildlife gave me the opportunities which were fairly substantial. For example, I visited the habitat of the right whale in Peninsula Valdez in Argentina, one of the few places where they can sometimes be seen, near Peninsula Valdez...

Q. How long were you at the site near the Peninsula Valdez?

A. That particular site, for a day. The other side, another day. There were several different species I was in-

terested in...I also went ot Fosiguasu...in northern Argentina, which is a fairly tropical area, in hopes of seeing some of the endangered wildlife there. It's jungle life habitat. And that was three days there.

Q. Your next stop?

A. After Buenos Aires was the area near Peninsula Valdez.

Q. Did you visit other sites to see wildlife?

A. Yes, around that area there were two or three wildlife sites. One was the camping ground of the right whale. The others were actually—I don't think elephant seals are endangered, but we did see elephant seals and sea lions, and Magnellan's penguins and such. Then at the foot of the Andes, that was the third site...

Q. Are you aware of any development projects associated with any of these areas that you visited?

A. Well, there are a number of development projects in the rainforest in South America, but I am not aware of any specific projects affecting these specific areas. However, I am concerned if any were to come along, we would not have any way to protect the wildlife without the consultation process in place...

Q. Have you visited any U.S. funded elephant project that you are aware of?...

A. I just wanted to point out that as a staff member of Defenders, I am often told about people's or members' visits to places, and it is sort of my responsibility to keep those things in my mind as I carry out my duties in this job. So that's a part of my job, is to represent Defenders' members' interests when they visit these places, and tell me about them and say there is something going on, and we are concerned about it.

Tr. at 15-19.

Testimony Regarding The Efficacy Of The Section 7 Consultation Process

Questioned by Ms. Kolker:

Q. Do you know if the Secretary can prevent a project from going forward?...

A. The consultation itself is designed to provide enough information to determine whether or not the agency action, the action agency's action is likely to jeopardize, and if so, to provide alternatives, or, in fact, a simple jeopardy opinion which the action agency should then consider in determining whether to carry out the action, and in fact, in all practical matters, the action agency would not then carry out the project if it were found to jeopardize the species.

Tr. at 13.

Testimony Regarding Deponent's Familiarity With This Action

Questioned by Ms. Kolker:

Q. What is your understanding of this particular lawsuit?

A. My understanding is that it is brought in order to require the Secretary of Interior to in turn issue regulations which require that agencies when carrying our actions which may affect endangered, threatened species in other countries to consult with the Secretary of Interior to ensure those actions do not jeopardize those species.

Q. When did you first hear about the regulation which is challenged?

A. I was generally aware of the regulation, but the specific promulgation of that regulation was in June, I believe June 3rd, 1986. So in the way of becoming specifically aware of it, when it was promulgated, then I read the Federal Register within a few days or so thereafter.

Q. You were not involved with the regulation prior to it becoming final?

A. Defenders of Wildlife was involved in commenting on it...

Q. How were you approached about participating in this case?

A. How was I approached?

Q. Yes.

A. As Defenders of Wildlife's Washington representative for endangered wildlife, I was not approached.

Q. How did you come to produce and sign this affidavit?

A. I wrote it.

Q. And in response to what did you write it?

A. My concern that the Endangered Species Act was being violated.

Tr. at 6-9.

DEPOSITION TESTIMONY OF JOHN W. GRANDY

December 19, 1988

Testimony Regarding Deponent's Personal and Professional Interest In Endangered Species Conservation

Questioned by Ms. Kolker:

Q. Is that affidavit still correct as to your education and your current employment?

A. Yes, ma'am.

Q. Have your duties changed?

A. Not my duties at the Humane Society. I have been appointed to another advisory committee to the Secretary of Agriculture.

Q. The name of that committee is?

A. It's Predator Control Advisory Committee to advise on predator control in the United States.

Tr. at 6.

Q. In your affidavit at paragraph 10, if you will turn to it so that you will have it in front of you, you mention visiting Costa Rica in 1979.

A. Right.

Q. Did you visit Costa Rica in connection with your employment?

A. Right. I visited Costa Rica in connection with the CITES conference, that's a conference on the Convention on International Trade in Endangered Species, Wild Fauna and Flora, to which I was an official observer for the Humane Society of the United States. I think I should mention as well that that is a treaty which I have had a longstanding personal and professional interest in. I helped draft it in 1971, '72...

Q. While you were in Costa Rica did you visit any sites to view wildlife?

A. Yes...I visited a national park on the east coast of Costa Rica, the name of which is Cahuita. Indeed, I was just in Costa Rica about two weeks ago again, and I was in Costa Rica earlier this year visiting national parks and protected areas. The first trip this year was again a professional representation at a meeting of the International Union for the Conservation of Nature and Natural Resources. This past like mid-November my wife and I went on a week's vacation to look at national parks and protected areas.

Q. Let's get back to the '79 trips and take these in order. While you were in Costa Rica you visited national parks?

A. Yes...

Q. You mentioned in 1981 a visit to New Delhi. Was that also in connection with your employment?

A. That was also in connection with CITES.

Q. And while you were in India, did you take the occasion to visit wildlife areas?

A. Yes, ma'am.

Q. What areas did you visit?

A. Actually I got sick. I stayed pretty much right around New Delhi. I went down into Old Delhi and went out—I did a lot of bird watching, but I got pretty sick...

Q. Nepal, again in connection with your employment?

A. Well, half employment and half pleasure.

Q. And where did you visit in Nepal?

A. Principally two National Parks, Chitwan National Park, and then an adjacent area called Tiger Tops.

Q. Are you aware of any United States development projects located near either of those locations?

A. No. I am aware that there is—I pause there because I am aware that there are some adjacent development projects, including one specifically with endangered species there that I would be surprised if it wasn't U.S. funded, at least in part.

Q. Do you have any specific information that leads you to believe that it is U.S. funded?

A. Only that the Nepalese Government does receive, again, a fair amount of funding from the United States Government. One of the specific things that the United States is interested in is some animal-related projects, and the project to which I refer was one of those.

Q. Is that a project to recover endangered species, or protect them?

A. Market them.

Q. Market them?

A. Yes, ma'am. It's a crocodile breeding project.

Q. Next country listed in your affidavit was Botswana, 1983. Was that in connection with your employment?

A. Yes ma'am. The same, with respect to CITES.

Q. And while you were there, did you take the opportunity to view wildlife?

A. I did, yes, ma'am.

Q. Are you aware of any United States development projects in the area of Botswana?

A. I am aware, quite aware that there are a lot of projects that are Peace Corps projects...

Q. Finally you listed a visit to Buenos Aires in 1985, also CITES?

A. Yes.

Q. Did you view wildlife in Argentina?

A. Yes, ma'am.

Tr. at 13-18.

Q. You are referring to the Polonoroestre project?

A. That's correct and that project has resulted in the destruction of substantial rainforest and wildlife habitat.

Q. And you believe that is funded by the World Bank?

A. Yes, ma'am.

Q. Do you believe that the World Bank is a Federal agency?

A. No, ma'am. But it is—it receives a lot of money from the United States and members of the United States Government sit on that governing body board, as I understand it, as they do on other development banks.

Q. You in that same paragraph said you suffered personal and professional harm from agency actions in the above-mentioned countries, referring to Costa Rica, India, Botswana, and Buenos Aires. Can you tell me the basis for that belief?

A. I know that our Government through international development banks, including the World Bank, and through our own AID contribute to development in those countries. To the extent that that development is less sensitive to environmental and endangered species than it should be as a result of our failure to comply with Section 7 of the Endangered Species Act, I would suffer both personal and professional harm.

Tr. at 19-20.

Testimony Regarding Deponent's Relevant Activities Since Affidavit Filed In November 1986

Questioned by Ms. Kolker:

Q. In addition to the trips you mentioned in your affidavit that you have mentioned, since then have you taken other trips abroad in 1986, 1987 and 1988, the years since the affidavit?

A. Yes, ma'am.

Q. And to what countries? Let's take 1987 first.

A. I take a lot of trips. Well, the principal one of interest here that I recall is to Kenya. This year, that is 1988, I have been to Kenya twice, and that means I went once in 1987.

Q. You went once in 1988 and once in 1987?

A. Twice in '88, once in 1987, right.

Q. On the 1988 trips to Kenya, what areas did you visit?

A. We traveled throughout the country . . . I am telling you. We visited Nairobi, Nairobi National Park, Amboseli National Park, Samburu National Park, traveled extensively by road in parts of the country. Then we traveled to Mountain Tops which is connected with Aberdare National Park, Masai Mara, which is a national park that constitutes the northern edge of the Serengeti. I think I left one out . . .

Q. How long was that tour?

A. About two weeks.

Q. And you did this twice in 1988?

A. Yes, ma'am.

Q. While you were in Kenya did you visit any development project funded by the United States directly?

A. Good Lord. I am absolutely certain I did, but we contribute I mean we, the United States Government con-

tributes money to a lot of things in Kenya. But I went principally to look at endangered species, and to show those to our members, not to review development projects. Although I went through a lot of them, I don't know that I went to one specifically funded by the United States Government.

Q. Other than Kenya this year and the Costa Rica trip which we discussed earlier, have you made any other trips abroad?...

A. My trips to Canada have all been wildlife related. But not in a direct observational sense. I went to Canada to discuss the Convention on International Trade in Endangered Species and our relationships through it with our Canadian neighbors.

Q. The 1987 trip to Kenya was the same sort of leading a group for the Humane Society?

A. Yes, ma'am. . . .

Q. Are you planning within the next year or so, do you have any firm plans to visit any United States-funded development projects abroad?

A. I intend certainly to go back to Kenya and to Botswana during 1989. I will certainly look for development projects in Kenya this time, and if I see any, I will find out who funds them, and I will see if they belong to the United States, you can count on that. My trip to Botswana this year will involve some U.S.-sponsored activity connected with protection of elephants, and things of that kind. Again, if I am in Botswana, I will certainly review any projects I see.

Q. You have not identified any specific projects that you intend to visit, specific sites?

A. The only one that I intend to visit in Botswana is a large area called the Okabonga swamp and Okabonga Delta which is the subject of development plans jointly funded, as I understand it, through the World Bank and

the Inter-African Bank and the EEC, that is, the European Economic Community, which have to do with cattle grazing in that region. I intend to review that. I suppose the U.S. is certainly an indirect sponsor of that through the World Bank.

Tr. at 21-26.

Testimony Regarding The Efficacy Of The Section 7 Consultation Process.

Questioned by Ms. Kolker:

Q. Do you believe that the contribution of funds by the Department of the Treasury to the World Bank is an event which would trigger the consultation requirement under Section 7 of the Endangered Species Act?

A. Sure. Absolutely.

Q. What is the basis for that belief?

A. It seems to me that that is precisely the kind of expenditure that the Endangered Species Act must be involved in in order to be effective. We can't—these development projects cause severe ecological and environmental damage in Third World countries, and others, and that damage has the—the mechanism of having consultation provides a way to limit that damage by involvement of the experts at the Department of the Interior and throughout the world.

Tr. at 26.

Testimony Regarding Deponent's Familiarity With This Action

Questioned by Ms. Kolker:

Q. Do you know if the Secretary of Interior or the Secretary of Commerce can require an agency to enter into consultation?

A. Well, they – my understanding is they cannot force them to do it. They are required to do it by statute, and I would assume that they would comply with the law.

Q. What is the source of your belief that it is required by the statute?

A. My understanding of Section 7. I should say I had a fair amount to do with drafting the original Endangered Species Act back in the early seventies, and have had sort of a personal and professional interest in it for some time. My recollection is that was the way we constructed Section 7. It has since been modified, as we all know, in response to some serious political problems, but basically the force, and effect, and intent of it is certainly still the same.

Q. Do you know if the Secretary can prevent a project from going forward?

A. I don't think he can. I'm not a lawyer, as I have told you, but it's my understanding that he cannot. What we are trying to do, here again, my understanding, we are trying to get the best information into the hands of the decision-making agency so that they can understand all the facts that might allow them to limit any harm or jeopardy to an endangered or threatened species.

Q. What is your understanding of the purpose of this lawsuit?

A. To force Seciton 7 to be complied with respect to projects outside of the United States, that is, in other countries...

Q. Do you remember when you first became aware of the regulation?

A. No. I have been generally aware of Section 7 for a long time, and the controversy over regulations to enact it that would cause Section 7 to be implemented internationally. I don't remember exact dates. . .

Q. Did you write your affidavit?

A. Yes, ma'am.

Tr. at 9-12.

3028L

DEPOSITION TESTIMONY OF MAXINE E. McCLOSKEY

December 20, 1988

Testimony Regarding Deponent's Personal and Professional Interest In Endangered Species Conservation

Questioned by Ms. Kolker:

Q. You were a board member of Defenders?

A. Yes, I am still on the board. I am secretary of the board and member of the executive committee.

Tr. at 6.

Q. Are you currently involved in any, personally involved in any ongoing research activities?

A. Yes. I am preparing a paper on ocean wilderness that I will give next year at the Coastal Zone Symposium.

Q. And what is the scope of that paper?

A. Well, this paper will explore the extent to which the concept of wilderness, which is something we have always associated with land, the extent to which that concept can be applied to the ocean environment.

Q. What percentage of your time would you estimate you devote to research activities, the preparation of this paper?

A. About 25 percent at the moment.

Q. And what percentage of your time do you devote to Defenders of Wildlife activities?

A. About 40 percent.

Q. Are you active in other conservation groups?

A. Yes. I am the Washington representative for the Whale Center. This is a volunteer position. I also am the Chair of the History Committee for the Sierra Club, and I serve on the Sierra Club's Centennial Task Force to observe the hundredth birthday in 1992, and I am also a member of the Sierra Club's National Wildlife Committee.

Tr. at 7-8.

Q. Let's work backwards, how many trips abroad have you made this year?

A. One.

Q. To what country?

A. Costa Rica and to Peru.

Q. And in 1987?

A. We went to Africa, Kenya and Sudan.

Q. 1986?

A. None. Well let's see, in '87 I also went to England, but that did not involve any wildlife observations...Well, actually in 1987, my trip to England, I went to be an observer of the International Whaling Commission annual meeting. It did not involve any field work at all, but I have been to a large number of Whaling Commission meetings.

Q. 1985?

A. 1985, Argentina, Brazil, Paraguay, also went to Switzerland, Italy and France, also went to West Germany.

Q. In 1984?

A. Japan and Spain.

Q. I will do a couple more years back.

A. Okay. '83, Australia and Seychelles.

Q. Prior to '83, are there countries that you visited for wildlife observation?

A. Yes.

Q. Tell me the names?

A. In '82, it was Indonesia; '81 was New Zealand; '79, the Soviet Union, and also Costa Rica; in '78, Mexico; '77, Australia.

MR. O'NEILL:

Are these in addition to the affidavit, or do they include the ones in the affidavit?

THE WITNESS:

Many of these are in addition to the affidavit.

Questioned by Ms. Kolker:

Q. So this is an exhaustive list, as nearly as you can remember with your notes, of countries you visited for the purposes of observing wildlife?

A. Or on wildlife-related matters. I could give you a list of the years where I attended meetings of the International Whaling Commission. That would be '78, '79, '80, '81, '82, '83, '84, '85, and '87.

Q. Did those involve field work or simply meetings.

A. No, there was no field work connected with the meetings themselves. On some occassions it's like the one in '85, the meeting was held in Argentina, so there was field work then in connection with that. And the first one, '77, that was in Australia, and, yes, there was field work there...

Q. What was the primary purpose of those trips [to Indonesia]?

A. Well, we had two purposes. One was to—I was invited to present a paper at the IUCN—...International Union for the Conservation of Nature—at the IUCN's Conference on Parks. These conferences are held every ten years, and I was asked to give a paper on whale sanctuaries. So we went for that reason. Also as an opportunity to visit wildlife habitats, and try to see wildlife while we were there.

Tr. at 16-19.

Q. With respect to paragraph 10 of your affidavit, you state that "During the trip to Bali I learned about the ongoing U.S.-funded translocation projects..." Can you tell me how you learned of those projects?

A. Well, actually I knew about the projects before we left, because my reading list is wide, and I read about many things. So when we were there, we made further inquiries about this from people, Indonesians, and wildlife conservationists who were there about what was actually happening...

Q. Do you believe these projects were directly funded by the U.S.?

A. Yes.

Q. Which agencies?

A. I believe it was U.S. AID.

Q. Can you describe the projects to me?

A. Well, the project referred to is one in which the overwhelming population numbers of the island of Java were just packed up and sent off to these other farther islands that were less densely populated.

Tr. at 21, 23.

Q. So in 1985 you are saying the only wildlife-related activities were to visit the Itaipu Dam and the visit in the Andes?

A. In addition, I went to West Germany that year to attend the Meeting of the Parties of the Marine Mammal Convention, also called the Bonn Convention. This is a convention on migratory species...

Q. In 1984 you listed trips to Japan and to Spain, I believe.

A. Yes...

Q. Did you do any wildlife viewing activities?

A. Yes we did.

Q. What?

A. On the island of Hokkaido we saw red-crested cranes in their habitat. And I also looked for minke whales, but didn't see any.

Q. Are you aware of any U.S.-funded development projects in Japan?

A. Yes.

Q. Do any of those projects have an impact on wildlife, to your understanding?

A. Yes.

Q. Can you tell me what project, please?...

A. There is one case where the U.S. Navy has asked the Government of Japan for permission to build housing units in a natural area, and the local people are very much opposed to it. It's the prime nesting area for many birds.

Q. Do you know if this project is going forward?

A. As far as I know, it's going forward.

Tr. at 39-41.

Q. You visited Spain in 1984 as well.

A. Correct.

Q. Did you engage in any activities there that involved field work?

A. Well, yes. We went again to an IUCN general assembly meeting that was held in Madrid. I represented Defenders of Wildlife there. At the conclusion of the meetings we drove down to southern Spain, and there was a national park on the southwest side of Spain. I am sorry I do not remember the name clearly. It's Odonya something. There were a number of endangered species there, but we were unable to see them. But we did visit the habitat.

Tr. at 42-43.

Testimony Regarding Deponent's Relevant Activities Since Affidavit Filed in November 1986.

Questioned by Ms. Kolker:

Q. In 1988 you visited Costa Rica and Peru?

A. Yes...

Q. Can you tell me where you visited in Costa Rica?

A. We were primarily headquartered in San Jose which is the national capital. We attended the meetings of the IUCN that were held there.

Q. Did you engage in any field work while you were there?

A. Yes.

Q. What sort of activities?

A. We went on a field trip to the Pacific side.

Q. For what purpose?

A. For viewing wildlife and wildlife habitat...

Q. What areas did you visit in Peru?

A. We first went north, northeast to Hauascaran National Park, and I believe that's spelled H-U-A-S-C-A-R-A-N, or close to that ..

Q. And from there?

A. From there we went to [city] and to Machupicchu...Then we went to the coast to the Paracas National Park, it's a marine park...

Q. What sorts of activity were you engaged in during those, aside from riding in the van?

A. Well, when we were at Paracas, we went out into a number of short excursions to view the habitat and the scenery and the park values, and we were looking for the [spectacled] bear that lives in that national park. While we were there we saw vicuna, the V-I-C-U-N-A.

Q. Are you aware of any Federally-funded, or authorized, or carried out projects in the areas in Peru that you visited?

A. I know that the Bureau of Reclamation has a number of irrigation projects scattered all over Peru...

Q. Can you tell me where any of them are located?

A. No. I just have seen a summary in the Bureau of Reclamation publication...

Q. Which publication was that?

A. It's a publication that was included in John Fitzgerald's affidavit.

Q. Was that the Water For The World pamphlet?

A. Yes.

Tr. at 30-34.

Q. In 1987 you indicated you visited Africa.

A. Yes.

Q. Kenya and the Sudan. How long were you in Africa?

A. About ten days.

Q. And where were you?

A. Well, we were headquartered in Nairobi, but we went out on a number of field trips from there...

Q. Did you have occasion while you were in Kenya to visit any development projects?

A. We did see some forest experiment and agricultural experiment areas...

Q. Are you aware of any directly Federally-funded projects in Kenya?...

A. I believe that U.S. AID does give money. In fact, we visited U.S. AID headquarters. I know there is an office there and ongoing programs.

Q. You don't know what they perhaps are?

A. Not specifically beyond the forestry projects and the agricultural experiments there.

Q. Did you visit any of the forest or agricultural experiments?

A. Yes.

Q. Do you believe those to have, or to be financed by the United States?

A. Probably one of them was.

Q. Can you tell me which one?

A. It's the forest one.

Q. Which forest one?

A. I don't remember the name.

Q. Can you tell me where it's located?

A. It's about 30 miles out of Nairobi.

Q. In which direction?

A. East.

Q. And did you visit that site?

A. Yes.

Q. Can you describe the project for me?

A. The project consisted of trying to find ways to improve the productivity of forest trees, and also certain other agricultural plants. There were various experiments on watering, and some of them were in deep ditches so the water would collect. Others of them were not. There were experiments of having rows of one kind of plant, and then a row of another kind of plant, and so on, this kind of an alteration. There were experiments as to the density of the trees that were planted, and there was one area where there would be one space that would have very wide density, that's few trees, and then others with various amounts of density of trees to see how well they would do. Others that had sort of an underground sprinkling system...

Q. You visited the Sudan for a period of how long?

A. Oh, about four days.

Q. And while you were in the Sudan, did you visit any projects?

A. Yes, we did. We visited again another forest project.

Tr. at 35-38.

Q. Do you have any present plans to visit any Federally-funded development projects overseas?

A. We probably will visit some in India a year from now.

Q. That would be in 19—?

A. That would be 1989. Probably December of '89.

Tr. at 45-46.

Questioned by Mr. O'Neill:

Q. Maxine, on the project in Kenya that you visited—

A. Yes.

Q. —was that an experimental project?

A. Yes. It was an experimental station.

Q. So the idea would be that it would look at ways to do it for other parts of the country?

A. Yes.

Tr. at 47.

Testimony Regarding The Efficacy Of The Section 7 Consultation Process

Questioned by Ms. Kolker:

Q. Are you familiar with Section 7 of the Endangered Species Act, "Inter-Agency Cooperation"?

A. Yes.

Q. Can you tell me your understanding of that section?

A. That section means that whenever an agency of the United States Government is contemplating a project that would take place in another country, it is required to consult with the Fish and Wildlife Service to see if there would be any impact on endangered species in that foreign country.

Q. Is there any other purpose of that section, to your understanding?

A. The purpose is to develop expert material, expert information that would guide the U.S. agencies and the foreign Government involved in coming to a proper decision.

Q. What is your understanding of that consultation process?

A. Well, my understanding is that the best experts about wildlife matters and endangered species in particular are with the United States Fish and Wildlife Service. So the process means that you are getting the best information that is available that would help people make rational decisions, Governments make rational decisions.

Tr. at 10-11.

Q. Do you believe that there is a connection between the 1986 regulation on consultation which is being challenged here and those [Indonesian] translocation projects?

A. I think it's an example of the kind of project that really needs and requires this kind of consultation. It's an excellent example. It's an excellent example of the impacts

that can happen when projects are undertaken without adequate information.

Tr. at 26.

Q. Can you tell me then what the basis of your belief is that requiring consultation would prevent harm?

A. Well, the basis of my belief is that I believe that people and Governments are capable of making rational decisions if they have the adequate information. The U.S. Fish and Wildlife Service has the best experts on wildlife and endangered species in particular. So if the information would be sought from the Fish and Wildlife Service experts and distributed to U.S. Government agencies involved, then I believe that people will do the right thing.

Tr. at 46-47.

Testimony Regarding Deponent's Familiarity With This Action

Questioned by Ms. Kolker:

Q. What is your understanding of the purpose of this lawsuit?

A. It is to require the Fish and Wildlife Service to do what is mandated in the Endangered Species Act. The Fish and Wildlife Service is directed to consult with U.S. Government agencies on projects that affect foreign countries that would possibly have some effect on wildlife. So if this suit is successful, then the Fish and Wildlife should return to its former regulations which allow it, or under which it goes ahead and does consultations.

Q. How did you first hear about the regulation which is challenged in this lawsuit?

A. I read it in the Federal Register[.]

Q. Do you routinely read the Federal Register?

A. Yes. Not every word, but I do receive notices of the Federal Register that affect all of wildlife matters, and many environmental matters, and I read them...

Q. Do you know when the regulation was published?

A. Well, I think it was June of 1986...

Q. Did you participate in any way in the rule-making?

A. No. But I understand that the Defenders of Wildlife staff has been following these issues carefully.

Q. When did you communicate to the Defenders of Wildlife your belief that you would be [injured] by the Secretary's regulation?

A. As soon as I read about the notice in the Federal Register.

Q. And what action did you take?

A. I consulted with the organization's [staff] attorney, John Fitzgerald.

Q. Did Mr. Fitzgerald request that you prepare the affidavit you submitted?

A. Yes.

Q. Did you write the affidavit, or did someone write it for you?

A. No, I wrote it myself.

Tr. at 13-15.

30241

DEPOSITION TESTIMONY OF ELLIOT McCLURE, Ph.D.

December 15, 1988

Testimony Regarding Deponent's Personal and Professional Interest In Endangered Species Conservation

Questioned by Ms. Kolker:

Q. The affidavit says that you are a member of Defenders of Wildlife. Is that still true?

A. That's correct.

Q. You have been since the early 1950's?

A. At least, yes.

Q. It says you were a member of the board of directors...

A. That's still true. I'm a member until next spring.

Q. You are chairman of the Tropical Wildlife International Committee?

A. That's right...

Q. What sorts of activities do you undertake normally for the organization?...

A. Well, we have annual meetings that are—I should say semiannual meetings of the board itself. A spring and fall one. My function as chairman of the committee was to keep my contacts with environmentalists and research workers in other parts of the world, and where they had problems involving their environment, to ask me, and I would try to get the Defenders' support in the form of letters and comments to governments that were involved. This has proved to be very effective in several instances where we were able to have a positive effect.

Tr. at 6-7.

Q. Let's talk about what has happened. Let's start with how many trips abroad you have made this year...

A. My last trip abroad was in '83 when I took a tour of 25 people to Southeast Asia.

Q. What country did you visit then?

A. Well, we did Malaysia and Sumatra and Borneo. Those are parts of the other countries. Then I did Thailand and bits of Japan at the same time. But I took the tour through those three countries.

Q. You did Thailand and Japan separately?

A. Yes. I stopped in Japan to check the research I have got going there.

Q. In the 1983 tour that you took, was that solely to view wildlife?...

A. Yeah. That was the object of it. The people went to see nature.

Q. What sorts of activities did you engage in?...

A. Well, every morning we went out, went bird-walking and mammal-walking and spent the rest of the day looking for gibbons and orangutans, what-have-you...We took—it was a 21-day trip.

Q. Your trip to Thailand was following that?

A. No. I was in Thailand for a couple weeks. Two weeks there.

Q. Then Japan?

A. Just two days. All those areas are places I had lived a long time. I lived in that part of the world from 1950 to 1975.

Q. In Thailand what sorts of activities were you involved in?

A. Well, I have a protege, I might call her, or student or research assistant that now is on her own, a Thai girl by the name of Pilai Poonswad. But, anyway, she is continuing the research on hornbills. They are large birds that live in the rain forest. So I went to—this study is being made at the Khao Yai National Park, and I went to Khao Yai National Park with her and checked out her study of the breeding areas of the hornbills...

Q. You mentioned in your affidavit that you were sponsoring continued research on endangered helmeted hornbills. Is this the project you are referring to?

A. That's right. It's still the same project...

Q. You visited Japan two days?

A. Yeah. That was just to meet friends there. See, between 1963 and 1973 we set up an international bird banding operation, and we had about 60 people on the field in 13 countries, and we were studying bird migration and the movement of parasites. It was a medically oriented study...And now Japan has a very active bird banding program, and he is chairman of it. And so I stopped in to see how he was doing with his banding work...

Q. Your affidavit says you were with Walter Reed Army—

A. —Institute of Research. Yes. All during those 25 years I was there. Walter Reed Institute of Research is, of course, oriented towards medicine, because that is by Walter Reed...And our program involved basically a study of diseases called zuoneses, Z-U-O-N-E-S-E-S. These are diseases that affect man as well as other animals. Most of them are diseases of birds, and we wanted to know in what way they were involved, if any, with the disease in man. So that accounted for such things as an international study of bird movement and so on. That was the whole 25 years until I retired.

Q. Did you have any specific professional responsibilities during that period of time for dealing with endangered species?

A. Any special responsibilities dealing with endangered species. Only in the sense of general information wherever it was available to me. I did a study of the gibbons in Malaysia and their family life...Yeah, gibbons are endangered.

Q. Was that related to your medical research?

A. Yeah. Yes, it was. And although we had to work around wild elephants, we didn't work with wild elephants. And then again, mainly the bird involvement. It's hard to say now. At those times some of the animals were not endangered but have since become endangered. Such things as some pittas, little birds called June Finches. And some of those have been endangered through destruction of the environment.

Q. You state in your affidavit that United States aid and funding for dams and development in both Thailand and Malaysia have harmed endangered wildlife. What is the basis for your belief that is the case?...

A. First, we'll take Khao Yai National Park in Thailand. That is where we have had a very critical situation. It is park of about 2,500 square kilometers. That's about 900 square miles. And it's in the center of the country; rain forest of several types. And it is the headquarters for three drainage systems that drain down through the center and the southern part of the nation. And developers wanted to put in three dams to flood a large part of the section of the center of the park, a large section of the cener of the park and develop hydroelectrical power for the farmlands surrounding the park. And in so doing, they would—if so altered, chances are the park itself would have been destroyed...Then the past three years they began agitating for a dam on the River Kwai in an area which—

Q. Excuse me, Doctor. When you say "they," can you tell me who you are referring to.

A. Okay. The department of the Interior, the Thai Department of Interior and Economics, it would have to be...two departments, would have to be the ones that were interested in it, and of course the public construction...

Q. Are you aware of any United States funding for that project? Direct funding.

A. It was, again, supposed to be through the World Bank as far as the one on the River Kwai. The one on Khao Yai, definitely we were told it was supposed to be from the World Bank.

Q. All I am interested in is the source of your information..

A. My only answer to that could be that it would be from newspaper articles and from conversation with government officials...

Tr. at 19-30

Questioned by Mr. Anderson:

Q. What, if any, endangered or threatened species have you observed?

A. Gee. In the wild?...

Q. In the wild under their natural habitat...

A. Wild elephants. We spent months trying to see the Sumatra rhino, which is called the one-horned rhinoceros, and we had one mother and her calf under observation... And several species of monkeys and several species of birds, and right on down the line. Wherever they were available and I had a chance to work with them.

Q. Would you have any kind of harm if any of those endangered species no longer existed or became extinct?

A. [illegible] the harm would be twofold. One would be deep [illegible]nal involvement because of the fact that I do know them and have worked with them. And the other would be professional, because my professional research and people that are carrying it on would be forced to stop. So they would have both professional and emotional impact, yes...

Q. Is it possible for you to tell us what the harm would be if the Nam Choan Dam were completed?

A. —the World Wildlife [fund] supported a young man...who did a study of the elephants both in Malaysia and in Southern Thailand. And he found that there were movements across this valley at different seasons of the year which were involving the breeding cycle of the elephants as well as their food habits. And flooding all that area would isolate the herds and could be expected to be of considerable damage to those herds.

It has reached the point now where the number of elephants that are still in the wild are very few, even in Thailand. So anything like that is harmful for the species.

Tr. at 41-43.

Testimony Regarding Deponent's Relevant Activities Since Affidavit Filed in November 1986

Questioned by Mr. Anderson:

Q. Do you continue to have contacts regarding research of endangered or threatened species in Southeast Asia?

A. Yes.

Q. Could you describe for us those contacts . . .

A. Well, in 1963 I began a study of the hornbills of Khao Yai National Park and continued it until my retirement in 1975. During that period of time I had a number of students and young people that were interested, but one in particular, this Miss Pilai Poonswad, became very deeply interested, and so she and I worked up a proposal, a research proposal for continued studies of hornbills which involved their life history and their food habits and the way they are supported in the forest and a very intense—a very, really complete study, what she has gone ahead and done . . .

Now, in Malaysia I haven't had as much opportunity to be involved in any specific research program. However, the University of Malaysia has been continuing in their studies of gibbons that I began in between 1957 or 1963 in the forest above the capital city of Khampal and Nuporkawol and Napoor.

Q. I want to know what your current research interests are.

A. Mainly functioning on the Khao Yai studies right now.

Q. So that would be the hornbills?

A. Hornbills. And it so happens that the one hornbill, the helmeted hornbill, which is one of the largest, is being listed as endangered. And since Pilai has gotten into the study and we now see how closely attuned the birds are to the forest, the entire family in Southeast Asia, about 35 species, are all endangered.

Q. Are the other hornbill species endangered or threatened?

A. Threatened, yeah...

Tr. at 38-41.

Q. You mentioned in your response to a question of Ms. Kolker that there was some additions that you wanted to make to your affidavit in light of what has gone on in the past two years; is that correct?

A. Uh-huh.

Q. What is the first addition you would like to make...

A. In paragraph 3 under "Personal Interests," I wanted to delete the "and continue to study and enjoy." I do not think I will have a chance to do that.

Q. Because of your age?

A. Because of my age. And then as the last sentence, "As research consultant, I maintain an interest in my colleagues' continued research in these areas which were above."

And then in paragraph 7 delete, "I plan to return to Thailand and Malaysia to continue my enjoyment of and research on wildlife." The important word there is "plan." I do not have plans for that.

Q. Again, is that because of your age?

A. Yeah. And financial condition. Now, I think this is too broad –

Q. Which paragraph are you referring to, sir?

A. Paragraph 8.

I think this is too broad. It's the line saying, "And the largest population of Asian elephants in Thailand which will be destroyed by the Nam Choan Dam." I think that is much too strong. Depleted or destroyed being a better adjective there...

Q. Okay. Continue...

A. Then down in the next paragraph, but it isn't numbered, beneath 8 there, this refers to the Mekong River Basin in Thailand and Laos with the reservoir that would irrigate 4.9 million acres. I wish to insert there,

"The resulting environmental destruction to bring this much land under cultivation would endanger numerous species as well as the Asian elephant and tiger and could harm research projects and staff of vital interest to me."

Now, in paragraph 9 I wanted to mention some of these animals and birds that are endangered. I only added two. So the sentence that read, "Portions of 100 species of mammals and 300 species of birds, some already near extinction such as White Eyed River Martin," M-a-r-t-i-n. Kitti, K-i-t-t-i, Kitti hog-nosed bat, both animals were originally discovered there, and the Sumatran rhinoceros in Malaysia, the Asian tapir and elephant have been endangered by the building of the Temenggor Dam in North Perak, Malaysia.

Paragrah 11 I wanted to substantiate a little more what was in that paragraph. You quizzed me more on No. 12, but for 11 I wish it to read, "As a student of ecology the destruction of endangered wildlife by the alteration of their environments in these and other areas harms me personally and professionally by depriving me and my colleagues of the opportunity for further research and reduces the natural base of the ecosystems important to all of us."

Tr. at 48-52.

Testimony Regarding The Efficacy Of The Section 7 Consultation Process

Questioned by Ms. Kolker:

Q. In paragraph 12 of your affidavit you state that, "Requiring consultation between the Secretary of Treasury and others and the Secretary of the Interior would help avoid harming and jeopardizing the endangered wildlife now threatened by projects described in this affidavit." Can you tell me the basis for that statement?...

A. The physical basis would be seeing what was happening in similar situations regardless of by whom they were being financially supported. And then the emotional

basis would be my opinion of what would happen to my field observations under the circumstances...

Q. Can you describe to me why you believe that requiring consultation between the Secretary of the Treasury and the Secretary of the Interior would avoid the harm?

A. Well, the Secretary of the Treasury must be involved in the original Act, Endangered Species Act, or required, shall we say, to have a consultation with the Secretary of the Interior or to see that one takes place, and that is why I have him in here, in this position. The act of consultation and thereby bringing forth by scientific and intellectual discussion the possible effects and their mitigation is, of course, to my mind one of the very few, if not the only real recourse, that we have to bring before local governments the information that they need and possible ways in which they could avoid harming or jeopardizing endangered wildlife.

Tr. at 32-35 [sic].

Questioned by Mr. Anderson:

Q. You gave some testimony with regard to what effect the consultation would have if there were consultation involving foreign projects, whether that would help. Do you recall that?

A. Well, my opinion of the consultation is that under the systems that we have developed in a democracy, there is little other ways – there is few other ways which you can effect any action then by consultation and examining all of its potentialities. And, so, to me, this consultation is the crux of the whole thing...

But under consultation where everybody is – gets together and sits down and looks at the whole project and looks at the attributes and environment is supposed to be in and the plants and animals that are supposed – that are there, the consultation is the only way to bring it into focus in such a way that those people who are planning to make use of it can either conceive of the mitigating meth-

ods or give it up altogether. So it looks to me like the use of consultation is the most dynamic method that is available.

Q. From your own experience do you know whether if, for example, a foreign government were presented with a consultation report that said that a project, if done, is in some way going to harm the environment whether they would act on this or just ignore it?

MS. KOLKER: Objection. Calls for speculation.

MR. ANDERSON: I asked based on his experience.

THE WITNESS: Yeah. It's not speculation. I've seen it in action. A lot of foreign governments of small nations, I don't mean necessarily small in size, although that is usually the case, but at least people that haven't had the vast resources that we have, the government officials are quite susceptible to the concept that they gain face, that they gain recognition internationally if they do something that will protect their environment...

I can show this having happened in the last three years in Taiwan. Taiwan has a large gorge in the east coast, the east mountain range...I think it was about 1986, '85 or '86, I got word from one of my cohorts, the young man that worked with me and now with the Asian foundation, said the Taiwanese Government has decided to put two dams on the tributaries of the river that form this great gorge...He wrote to Defenders, wrote to me. I took it up with Defenders. Other people took it up with other agencies, other organizations, and we began writing letters. And the Taiwanese Government officials were so impressed by these letters that even the Minister of Economic Development was convinced that they made a mistake. And they made their first national park for the whole country out of this Taroko Gorge, and it's a direct effect of letters from American people.

Tr. at 43-47.

Questioned by Ms. Kolker:

Q. You have referred to this project in Taiwan. Do you have any reason to believe that that was funded by any American agency?

A. No. No, it wasn't that. I've only used that as an example of how American interest can produce a positive effect.

Tr. at 54.

Testimony Regarding Deponent's Familiarity With This Action

Questioned by Ms. Kolker:

Q. What is your understanding of this particular lawsuit? I am referring to the Defenders of Wildlife vs. Donald Hodel.

A. My understanding of that is that the clause which required that any agency that was destined, shall we say, to spend money, to give moneys to an organization...for expenditure overseas or to expend money themselves overseas for any type of project that would involve environment, must first, before that proposition would become an actuality, such as whether a dam be built or a road or anything like that, would have to have consultation with the experts in the Fish and Wildlife Service to determine the probable effect of such a project. And that was my—it was my understanding that is the way it was set up.

But in 1986, I guess it was, that clause was, can I use the word rescinded or altered, so it was no longer necessary to have consultation. And it would appear to me that the Defenders' suit is based upon that situation, whereby the Fish and Wildlife Service took it upon themselves to change a clause that was in the original Act when we feel that it was very important to be retained.

Tr. at 14-15.

DEPOSITION TESTIMONY OF J. CAMPBELL PLOWDEN

December 19, 1988

Testimony Regarding Deponent's Personal and Professional Interest In Endangered Species Conservation

Questioned by Ms. Kolker:

Q. Can you tell me your current employment?

A. I currently am the Whale Campaign Coordinator for Greenpeace, USA, and volunteer president and executive director of TERRA, Tropical Ecosystem Research and Rescue Alliance.

Q. How long [have you] held that post?

A. I have been with—I have held this current post with Greenpeace since January of this year and a similar position before 1985 as well.

Q. And prior to that January of 1988 where were you employed?

A. I was employed as the Whale Campaign Coordinator for the Humane Society of the United States in Washington between 1985 and 1987.

Q. In 1987 where were you employed?

A. Well, I worked at the Humane Society of the U.S. until the end of 1987 and came back to Greenpeace in early 1988.

Q. Your affidavit states you received a BA in biology with an emphasis in ecology and environmental studies. Have you had any further formal education since 1975?

A. Formal education, no. But I have devoted my life to environmental activities and ecological studies.

Tr. at 6-7.

Q. In your affidavit on page 3 at paragraph 7, you discuss a visit to Brazil and Peru in 1986. You list visits to Carajas...iron ore mine and Balbina hydroelectric power dam which you apparently believe are financed by the World Bank. What is the basis for your belief that those are World Bank projects?

A. Well, I researched the Carajas iron ore mine beforehand and discussed it with World Bank officials and the Balbina dam, while not a direct World Bank project, has received funding under power sector loans to Brazil from the World Bank.

Q. Did the Carajas project go forward?

A. Yes, the iron ore project itself is now complete and the Grande Carajas project is under consideration for further funding by the World Bank.

Q. Do you believe the World Bank to be a Federal agency?

A. It is not strictly a Federal agency, but has very direct influence and funding from the United States Government through the Department of Treasury, and an American is traditionally now the president of the World Bank.

Q. The two projects which you listed in that same paragraph 7, Polonoroeste and Rondonia, the Samuel dam, you believe those also to be World Bank funded projects?

A. Yes, in part both have received funding from World Bank.

Tr. at 13-14.

Q. In paragraph 8, you mention a trip in 1986 to Peru and an Agency for International Development project. Did you visit that project?

A. I did not visit that project specifically, but went to jungle region near Iquitos, Peru which shares many of the same ecological properties and many of the same species in that area.

Tr. at 15.

Q. In addition to the countries that you listed in your affidavit, are there other countries that you visited in connection with your concern for wildlife?

A. . . . I referenced the Serengeti. So during a visit to the Serengeti region when I was 12 years old, I visited parts of Uganda, Kenya, Tanzania. I also lived in India for one year, briefly visited Ecuador, Uruguay, Argentina.

Q. These are in addition to the countries you have listed in paragraph 3 of your affidavit?

A. Yes.

Q. Are you aware of development projects directly funded by the United States which are currently going on in any of those countries?

A. I believe U.S. AID is still active in the Philippines and India, but I do not have information about projects there. . . .

Q. TERRA, the organization which you founded, are you presently conducting research in an area which you believe to be impacted by United States development projects?

A. TERRA is active as a nongovernmental organization within the International Tropical Timber Organization, and through our involvement with the ITTO, we are giving our opinions on a whole range of timber projects in many parts of the world, some of which the U.S. is active in through AID projects.

Tr. at 22-24.

Questioned by Mr. O'Neill:

Q. I am interested in the paragraph 8 of your affidavit in which you talk about the Picchis-Palcazu project. Would the Picchis-Palcazu project have had an impact on the population of jaguars, Uakari and Geoldi's marmoset for the area in which you visited?

A. Yes. It could have.

Q. Why is that?

A. The area that I visited and the area of the Picchis-Palcazu project are contiguous areas of tropical moist

forest and reducing the population in one area affects the population in its entirety, reducing the size of the gene pool and making it that much more vulnerable to catastrophic events.

Q. What was the nature of the Picchis-Palcazu project?

A. It was or properly still is a forestry project involving clear cutting strips of timber for a development project for native people to market those timber products. And it's a[n] experimental forestry system for doing that.

Q. It's an experimental forestry system?

A. Yes.

Q. What does that mean?

A. They were experimenting to see if a sustainable system of clear cutting strips of timber could be done in a way which would allow for natural regeneration of the timber over a period of time.

Q. So it's a prototype?

A. Yes. It was a prototype which, if successful, could be expanded to other parts of the Amazon.

Tr. at 25-27.

Testimony Regarding Deponent's Relevant Activities Since Affidavit Filed in November 1986.

Questioned by Ms. Kolker:

Q. In paragraph 12 of your affidavit, you indicate that you planned to visit Rondonia – and I don't know how to pronouce the second one.

A. Acre.

Q. – to visit projects there. . . .

Q. In addition to the funds provided by the World Bank and the Interamerican Development Bank, do you believe there are funds directly committed by U.S. agencies to either of those two projects?

A. No, I'm not aware of that. Since I wrote this affidavit, however, there is an additional concern. . . . The projects in question in Rondonia and Acre have been an extension of paved road from southern Brazil out to virtually the western border of the Amazon, and there is an expressed interest in both Peru and Brazil to potentially complete a road between Acre and Peru; and if there is interest in going ahead with that project, since the U.S. has been active in Peru, I would be concerned that U.S. AID might be involved on the Peru side of that which would have just as great, if not greater, impact on endangered species in Brazil even if the project was only funded on the Peru side.

Q. What is the source of your belief that AID would sponsor such a project?

A. I don't have specific information that they would sponsor, but since AID has been active in Peru in the past, it seems there is at least the possibility that they would be potentially interested in such a project.

Q. Your affidavit states that you plan to visit parts of the Amazon and in Peru where the U.S. AID has been active in sponsoring various development projects. Which projects?

A. I mentioned the Picchis-Palcazu project and in the affidavit, as I stated, I have not visited there, but I would like to visit there in the future.

Q. Do you have a present plan to go there?

A. I am planning to go back to the Amazon next year and if possible I will also visit that specific project.

Tr. at 18-21.

Testimony Regarding the Efficacy Of The Section 7 Consultation Process.

Questioned by Ms. Kolker:

Q. You mentioned that reducing the size of a population in one area affects the gene pool. What is the basis for your belief that the size of the population was actually reduced in the Picchis project?

A. Well, I don't believe I said it was reduced. I believe it could have been reduced. I am aware of the forestry aspects of the project, but I did not do specific field research to be able to verify that. In fact, this is one of the reasons I think why consultation would have served a very useful purpose here. There were no base line studies done which could have enabled anyone to even render such an opinion at this point. . . .

Q. So you are not aware—you have not done any research and you are not aware of any research on the actual impact of the project on wildlife? . . .

A. From my training as an ecologist and generally having an understanding of how wildlife operates in its habitat, one can make certain predictions about how this type of system will impact wildlife.

Tr. at 28-29.

Testimony Regarding Deponent's Familiarity With This Action

Questioned by Ms. Kolker:

Q. Can you tell me to the best of your understanding the purpose of Section 7?

A. The purpose of Section 7 is basically a requirement that any Federal agency which is conducting an action which could affect a listed endangered species is required to consult with the relevant agency, whether the Department of Interior, Fish and Wildlife Service or with fish-

eries species with the Department of Commerce, National Fisheries Service to get their opinion, recommendations concerning the impact that action would have on those species.

Tr. at 8.

Q. What is your understanding of the purpose of this lawsuit?

A. The purpose of the lawsuit, as I understand it, is to basically codify that the Secretary—excuse me—that any Federal agency will be required to carry out the relevant consultations under Section 7, no matter where this Federal action takes place, be it in the United States or internationally. . . .

Q. How did you first hear about the regulation which is being challenged in this lawsuit?

A. Well, when I was a staff member at the Humane Society of the U.S., John Grandy told me about it and subsequently I volunteered that I had had certain experience doing field work in relation to endangered species abroad and so discussed how my experience might be of assistance with him and John Fitzgerald.

Q. Do you remember when that was, when those discussions took place?

A. It would have been in general in the middle to summer-fall 1986 after I returned from several months in the Amazon. . . .

Q. Did you write your affidavit?

A. Yes, I did.

Tr. at 11-13

DEPOSITION TESTIMONY OF STEVEN C. SCHROER

December 14, 1988.

Testimony Regarding Deponent's Personal And Professional Interest In, And Litigation Ability Regarding, Endangered Species Conservation.

Questioned By Mr. Shockey:

Q. Are there other professional degrees or any formal training that you have had particularly in regard to wildlife matters?

A. Actual degrees, no.

Q. What about training or graduate courses? . . .

A. I might add in that regard . . . I do have training in international law both from my undergraduate legal institution Columbia and a postgraduate degree I took at Cambridge, and I did do some study of environmental law and environmental – international environmental legal matters.

Tr. at 6.

Q. Before this case, had you worked on other Endangered Species Act litigation?

A. I have had involvement in some, yes.

Q. Do you recall what case or cases there were?

A. Well, the Minnesota wolf case I have had some.

Q. That was *Sierra Club versus Clark*?

A. Yes. Well, not all the work we have done as a result of the litigation. I have assisted in some work relating to the grizzly bear out in Montana. There have been other things, but off the top of my head, that's what comes to my mind.

Q. Apart from this lawsuit, have you had involvement in any matters or lawsuits involving the Endangered Species Act that related to actions outside of the United States?

A. I'm digressing for a second. The Strychnine case I think has allegations under the Endangered Species Act and I have had some involvement in that too. Actions outside the United States, the Strychnine case and perhaps some other cases that I have worked on including the wolf case, I believe have in part concerned or had issues that related to treaty obligations of our government, particularly treaties in Canada.

Tr. at 10-11.

Q. And near the end of Paragraph 3 [of your affidavit] you indicate, as you mentioned earlier, that you prepared a master's thesis at the University of Cambridge that dealt with, I'm quoting from the affidavit, "international law regarding an anadromous fish species."

A. Yes. . . .

Q. Did that thesis address international law regarding the fisheries in any particular geographic area, for example, the Facific Ocean in the Pacific Northwest of the United States or the North Sea?

A. I haven't read that thesis in a long time because my copy burned five years ago in a fire we had in our law firm, but the way I remember the thesis, its first part discussed generally international law, particularly questions of international jurisdiction relating to fisheries' matters. . . . Then I believe in the latter part of the thesis there was some analysis given by illustration of how I then perceived the current state of the law might apply to certain circumstances. Among the things I discussed were the fishery for Atlantic salmon and the fishery for Pacific salmon. And I believe I discussed in that context whether, as a matter of international law, I believed that an individual nation had the jurisdiction to regulate the activities of both its own citizens and foreign citizens both in its own territorial waters, in the high seas, and in territorial waters of other countries.

Q. Did you reach a conclusion regarding the territorial waters of other countries?

A. I believe my conclusion was that a country such as the United States, as a matter of international law, always had jurisdiction to proscribe the activities of its own citizens and its own agencies, whether or not their actions are taking place within their geographical confines.

Tr. at 25-27.

Q. What endangered fish do you enjoy?

A. Endangered fish?

Q. Yes. . . . Well, you indicate in the affidavit that you have an interest in quote, "personally enjoying endangered or potentially endangered fish."

A. There is—let me be clear. I have never seen an endangered fish. I would like to see one, and I would like my right to see one to be protected. And my interest in endangered fish is aesthetic and intellectual because I have never had the opportunity to see one. . . . There is, I think you will find on the endangered species list, a golden trout which inhabits mountain lakes, I believe, in Mexico and the western United States and I have a great interest in that particular fish.

Q. Have you personally ever visited the habitat of that fish?

A. I believe I have. They are pretty rare and as I say, I have never seen one but I have visited Mexico and hiked in the mountains and I have hiked in the mountains in the western United States where I believe golden trout may still exist in some places. . . .

MR. O'NEILL: I think it's the yellow kern golden trout to be specific, that's how they are on the list I looked at. . . .

Tr. at 35-36.

Q. Okay. Have any of these trips been for the sole or principal purpose of observing wildlife in general or endangered species in particular?

A. I think on virtually every trip I do I make an effort to get out and see whatever wilderness type areas and natural habitat I can get to. Whether it's ever been for the specific purpose of looking at those depends on the circumstances. . . . [S]eeing an endangered species is a pretty rare thing but I have seen grizzlies, I have seen from the air at least wolves.

Q. Outside of the United States?

A. The wolves I have seen were up in the Boundary Waters, I think they were on the American side of the border. I have seen eagles probably in—probably in Canada. . . . I have also observed bald eagles that I know have migrated from Canada. There is a wonderful place in Glacier Park where if you're there at the right time of year you can see hundreds of bald eagles at the same time.

Q. How do you know that they migrated from Canada?

A. Well, I didn't watch them fly but I have read that in the Department of Interior literature that told me what I was looking at.

Q. I'm sure that's an unimpeachable source. . . . To your knowledge have you ever seen any listed endangered or threatened species outside the United States?

A. Well, when you're up in the Boundary Waters you sometimes aren't sure which side of the border you're on. I have seen bald eagles up in the Boundary Waters Canoe Area and I can't tell you for a fact that I have seen them in Canada, but I have seen them in that general international boundary area.

Q. Any others come to mind?

A. Gosh, I thought it was pretty good having seen three kinds of endangered species anywhere.

Tr. at 47-49.

Questioned by Mr. O'Neill:

Q. Did you have an understanding as to the purpose of your affidavit when your affidavit was prepared, executed and submitted to the Court?

A. I did.

Q. And what was that?

A. It was to illustrate my own personal interest in this matter and the legal subjects of this matter, also to illustrate my experience and what I believe to be my abilities as attorney for the—as an attorney for the Plaintiffs in this matter, which I believe will help assist in vigorous litigation and identification and analysis of the legal issues involved. In other words, to help show the adverseness of me and my clients to the government's position.

Tr. at 65.

Testimony Regarding Deponent's Relevant Activities Since Affidavit Filed In November 1986.

Questioned by Mr. Shockey:

Q. Could you just briefly identify what those documents are?

A. I brought my current passport. I brought my prior passport which expired in 1980. I brought a copy of Volume 12, Number 2 issue of a periodical called *Cultural Survival Quarterly*, it's my personal copy of that which I received sometime last fall. I brought a map of Thailand and I brought an airline ticket that I have in connection with a trip I will be taking to Thailand leaving on Christmas Eve day.

Tr. at 12-13.

Q. What is the date that that document [*Cultural Survival Quarterly*] was published? The magazine quarterly?

A. It's the—it's Volume 12, Number 2, 1988 and I believe I received it in the fall of 1988, that is within the last several months. Of particular interest to me, because of my upcoming trip to Thailand, is an article beginning at Page 13 of this issue regarding the Nam Choan Dam project in Thailand.

Q. Could you spell Nam Choan, please?

A. Two words, N-a-m, C-h-o-a-n. Mention is made at Page 15 within that article that this proposed dam would have included potential "loss of rare lowland riverine forest, which is the preferred habitat of the endangered green pea fowl and is seasonally important to many mammals such as tapir, tiger, wild cattle and elephant; blocking of the migration routes of large mammals such as elephant and guar; and fragmentation of animal populations into smaller units, thus increasing the chances of extinction through inbreeding and accidental fluctuations."

Tr. at 14-15.

Q. Could you briefly identify foreign countries that you have traveled to other than those listed in your affidavit? . . .

A. I tried to get in Fiji but they had a military coup and they weren't allowing people in. Then in the next two weeks or three weeks I hope to have also visited Thailand and Hong Kong, perhaps dribbling over the borden into a couple of other adjacent countries if that kind of travel is permitted. . . .

Tr. at 46-47.

Q. Do you recall those projects offhand?

A. I recall the reference to them in the litigation papers. I don't, expect with respect to the Nam Choan Dam which I was talking about earlier that I hope to be visiting in a couple of weeks, I don't have personal knowledge about those other projects. . . .

Q. So I take it you have not toured any of the sites of these projects and don't at this point have any firsthand knowledge of what the projects involve or what species might be present?

A. My own – personally not yet. I, as I say, hope and expect two weeks from now to be in Thailand and at that time to visit the site of the proposed Nam Choan Dam, but as of this moment, you're correct.

Tr. at 50-51.

Q. What – you mentioned several times the trip you're going to be taking very shortly to Thailand and perhaps to some other countries. What is the purpose of that trip? Are you going as a tourist or is this a business trip?

A. It's not a business trip. It's to pursue my interest in travel and seeing countryside. I hope, for example, to spend some time hiking around the areas in Thailand where there are indigenous hill tribes including the Nam Choan area where, at least according to what I have read, there are Khmer and Karen tribes, people who are still living in essentially wilderness type areas where coincidentally there also happens to be this dam project and a number of endangered species. . . .

Q. Do you plan to visit the site of the Nam Choan Dam project?

A. Well, it's not a project yet, but I hope to visit that area.

Q. Do you now where the project site is to occur?

A. From what I have read here, yes, I have a map I can show you.

Q. Yes, why don't you, I would be interested in seeing. You might just identify that map for the record.

A. This is Hildebrand's Urlaubskarte of Thailand Burma, Malaysia and Singapur [sic]. And I guess I can show you how I have figured this out. As a matter of fact, I put

a red box around the general area where I believe the project is. It's northwest of Bangkok and south of Chiang Mai. And this article describes the area and contains a more detailed map showing the proposed Nam Choan Dam site directly—appears to be at least directly south of Tak and I'm pointing to an area within that red box that I have drawn on the map where I believe it to be. . . .

Q. And where do you plan to travel in Thailand?

A. Well, I'm not the kind of person who goes with specific reservations, but my plan is to spend two or three days in Bangkok then travel up to Chiang Mai and explore that general part of Thailand . . . the north and northwest part of Thailand including the area we have just been talking about where that Nam Choan project [is].

Tr. at 53-56.

Testimony Regarding The Efficacy Of The Section 7 Consultation Process.

Questioned by Mr. Shockey:

Q. Okay. Do you know if the Secretary has the authority to stop a project from going forward based upon the results of the consultation if he finds it is, for example, likely to jeopardize an endangered species?

A. Well, if he is of that view, it's certainly his duty to give that advise [sic] to the action agency and I also believe it's the duty of the action agency to abide by the requirements of the Endangered Species Act and other things. I'm not sure if I have a view without reviewing the statute on whetner the Secretary of the Interior is actually empowered to himself enjoin or somehow order a coordinate agency not to do something. I think the intent, however, is that he at least give that expert consultation that Section 7 contemplates and I would hope and expect that coordinate agencies would take that consultation into consideration

at the very minimum when deciding what they are going to do or not do.

Tr. at 23.

Q. What I hope is my last question, could you please explain how the amendment to the regulations by the Fish and Wildlife Service in 1986 will change the consultation requirements in a way that affects you and your interests in endangered species?

A. Well, as I think I have illustrated to you, I have substantial professional, personal, intellectual and aesthetic interests, not only in environmental matters generally and Endangered Species Act matters specifically, but also a great personal involvement in international things, travel and the like. I enjoy not only studying these things and reading about them and, you know, working on litigation like this relating to these matters, but I like to experience those things out in the real world, such as through the trip I'm going to be taking in a couple of weeks to Thailand. My interests of those sorts, for example, to visit habitat where I know endangered species are believed to exist, even if I never see them, is important to me.

I believe that the Section 7 mechanism provides a procedure by which, what I hope are the countries best experts, the Fish and Wildlife Service people, can give their views based on their expertise to my government when it's doing things in foreign countries which will help protect places like the area in Thailand I'm going to go, protect the habitat there, protect the endangered and other wildlife, potentially endangered species that are there and thereby protect my own personal interest, not only in studying those things and reading about them, but actually visiting those areas.

Q. If it turned out that the Secretary or federal agencies in fact did not consult on projects in which they were

involved in foreign nations before the 1986 regulations, and if the regulations have now been changed to on their face eliminate that requirement, how will the change in regulations affect your interest in enjoying these endangered species' habitat activities? In other words, is there going to be any difference between if you assume that there was not consultation before '86 and the regulations do not now require consultation?

A. If I assume that prior to '86 the agencies were not complying with the law?

Q. No, don't draw the legal conclusion. I'm just saying they are not consulting, they didn't consult, whether or not they were required to. . . .

THE WITNESS:

Well, you know, my general reaction to that is two wrongs don't make a right. I mean, if they were not consulting pre-'86, in my view, they were violating the law; and I don't think that purporting to condone that violation by changing the reg on a post-hoc basis makes what they did before right and what they're going to do in the future any more right.

I hope that the assumption, the premise of your question that they weren't consulting is wrong, and I firmly believe and trust that when Judge Alsop and the Court of Appeals and the Supreme Court, if it gets that far, direct the agencies to consult, as I think they will, that they will now comply with the law even if they haven't in the past. That's the remedy that I'm looking for to protect my own personal interests in these matters.

MR. SHOCKEY:

You can rest assured the Justice Department will advise the agencies to do so if that should happen.

Tr. at 60-63.

Testimony Regarding Deponent's Familiary With This Action

Questioned by Mr. Shockey:

Q. Could you briefly state your understanding of the relief that the Plaintiffs are seeking in terms of the Endangered Species Act or ESA?

A. Under Section 7 of ESA there is a requirement, according to my own understanding, that when agencies of the federal government are going to take or authorize action that may affect habitat or existence of animals or plants covered under the Endangered Species Act, that they consult with the Fish and Wildlife Service or other experts within the government to assure that there is no jeopardy to endangered species or plants or if there is some, to propose alternatives and to advise federal agencies proposing such action as to what they think ought to be done.

It's my understanding that the Department of Interior proposed a new regulation which would dispense with that consultation requirement for purposes of United States agency action which may take place in foreign countries and the relief sought is an injunction prohibiting the Department of Interior from eliminating that consultation requirement as to agency action in foreign countries.

Tr. at 8-9.

Q. Were you aware of [the 1978 Rule's] geographic scope in terms of whether it was limited to the United States and the high seas?

A. I'm not quite sure how to answer that. It's always been my view that the Endangered Species Act applied to actions of the United States citizens including government agencies wherever in the world they may be, and whether I was specifically aware of how the regulation dealt with that in terms of what it said geographically, I don't really remember.

Tr. at 10.

DEPOSITION TESTIMONY OF AMY K. SKILBRED

December 15, 1988.

Testimony Regarding Deponent's Personal And Professional Interest In Endangered Species Conservation.

Questioned by Mr. Pollard:

Q. You were, at one time, a member of—a staff person on Defenders of Wildlife, weren't you?

A. Yes.

Q. From what days?

A. I was a staff person there for two and a half years. Let's see. 1984, August of 1984—that was the last election, right—through until February 1987, to the best of my recollection.

Q. Okay. And what was your job title?

A. Alaska Public Lands Specialist and National Wildlife Refuge Specialist.

Q. And could you just briefly describe what your duties were for the Defenders at that time?

A. I planned and decided the Alaska program for Defenders of Wildlife, including what issues we would pursue, how we would pursue them, grassroots outreach, press, media development. And then for National Wildlife Refuge issues, I worked with another staff member on refuge issues, including the refuge programmatic EIS, and on specific refuges, as well.

Q. Is your interest in wildlife primarily recreational or professional at this time?

A. It is still primarily professional, but recreational—I do a fair amount of bird watching, watching wildlife, so I guess it is a combination.

Q. In what respect would it be professional at this time?

A. The jobs that I'm looking for up here and the sort of career jobs I'm looking for would still have to do with

wildlife, environmental protection, habitat protection and pollution problems.

Q. Have you applied for any employment in any wildlife organization or habitat professional organization here in Alaska?

A. I haven't yet applied, but there are several positions open with the Department of Environmental Conservation, and a position with the Environmental Protection Agency.

Q. That's the State of Alaska –

A. The State of Alaska.

Q. – Department of Environmental Conservation –

A. Right, and the Federal Environmental Protection Agency.

Q. What was your employment just prior to working for the Defenders?

A. I worked on Alaska issues for the Wilderness Society.

Q. The Wilderness Society?

A. Uh-huh.

Q. Could you –

A. What I did?

Q. – describe what the Wilderness Society is? Is that –

A. Oh, the Wilderness Society is a nonprofit environmental organization with offices throughout the United States.

Q. And what were your duties there?

A. I was first an intern and then an assistant to the Alaska Program Director. The final thing that I did was I wrote a booklet called the "Watt-Clark Record on Alaska.". . .

Q. And what were the dates – I'm sorry. What were the dates of employment there, just roughly?

A. I worked there for a year and a half. Let's see. It ended June of '84. Beginning—about February, March of 1983 until June of 1984, something like that.

Tr. at 9-13.

Questioned by Mr. Pollack:

Q. Okay. For 1988, how many trips have you made abroad?

A. One.

Q. One? And to which country was that?

A. To Denmark and Norway.

Q. And in 1987?

A. One to France, Norway. . . .

Q. In your affidavit, you only listed Sri Lanka as a country to which you traveled. Did you travel—

A. In the affidavit that is all that is mentioned. I went to other countries, though.

Q. Okay. Prior to 1986, which countries in addition to Sri Lanka did you travel to?

A. Nepal, India, Italy, France, England, Norway, Germany, Holland, Luxembourg, Belgium, Russia, Canada, Mexico, Puerto Rico—This gets to be a lot of them—Puerto Rico, several different Caribbean Islands. Do you want—

Q. Well, for the record, which Caribbean Islands?

A. I'm trying to think of the name. It begins with an M. Grand Cayman—I have forgotten the name of the other one. I have forgotten the name of it. It wouldn't pertain to this lawsuit, to my knowledge.

Okay. Fine. Going back over these, can you tell me when, generally, what year, you made these trips?

A. Sure.

Q. To Nepal?

A. Nepal would be 1981-82.

Q. India?

A. 1981-82.

Q. Italy?

A. 1983 and 1976. . . .

Q. And France?

A. France, 1959 to 1960. I was born there. Two trips as a child; 1987, 1976. . . .

Q. England?

A. England, 1976. That would be – might have been 1975, as well.

Q. All right. Norway?

A. Norway? One trip – two trips as a child – below the age of 14, let's say. Then 1975 to '76, and then – okay. You have the other one down.

Q. Okay. Germany?

A. Germany? 1975, 1976, and then you have the other one.

Q. Holland?

A. 1976.

Q. Luxembourg?

A. 1975. I think that's all.

Q. Belgium?

A. 1976.

Q. Russia – you mean the Soviet Union?

A. Soviet Union. 1976.

Q. Mexico?

A. Mexico might have been – let me think a second. That was probably 1986, actually, so it would be up above.

Q. All right. Your Caribbean trip in which you visited Grand Cayman?

A. Yes. It was a cruise. Yes. Grand Cayman was the same time.

Q. And that was 1986?

A. Yes, '86.

Q. And Canada?

A. Canada? 1972 or '73, and time as a child before that, maybe 1971.

Q. Okay. Out of all those trips, which of them involved observing or attempting to observe wildlife as a purpose of the trip?

A. As the sole purpose?

Q. Well, as a significant purpose. . . .

A. If you mean on which of those trips did I view wildlife – can we take it that way? The trip to India, Nepal, Sri Lanka –

Q. Would you like me to repeat the trips one by one for you?

A. No. I would think most of the trips before that – viewing wildlife was something that I did on all those trips, and the trips since the, viewing wildlife – I mean, the trip to Denmark and Norway was our honeymoon, so I couldn't say the significant purpose was to view wildlife, but viewing wildlife was something that I did.

Q. Okay. But for those trips in which wildlife viewing constituted a significant or important purpose, major purpose of the trip, you would say that Nepal, India and Sri Lanka –

A. Definitely; definitely. On the other trips, wildlife viewing did occur.

Q. All right. Well, let's go back over some of the countries individually, and I want to start with Sri Lanka.

A. Okay.

Q. Once again, you visited Sri Lanka over what period of time?

A. 1981 and 1982, and that would have been December to January or February, I believe.

Q. All right. And were you there continuously during that period?

A. Yes.

Q. What activities did you engage in while you were there?—

A. Wildlife viewing, tourism, recreational activities, backpacking.

Q. Okay. Was that wildlife viewing that you did there part of an organized activity? Was it independent?

A. Independent.

Q. Was your hiking trip there independent?

A. Yes, I was traveling there by myself.

Q. Okay. So backpacking, bird watching? Did you say bird watching?

A. Bird watching. I didn't, but bird watching, definitely.

Q. Where did you engage in those activities? For example in Sir Lanka, backpacking?

A. Throughout Sri Lanka. The Mahaweli River Valley; another national park in southeastern Sri Lanka; Newar Eilya in central Sri Lanka. . . . In and around Kandy. . . . On the coast—if we can use backpacking and boating—

Q. Yes.

A. —on the coast, from Trinco Malee . . . and from Newar Eilya out to Adams Peak, which is a wildlife area.

Q. Would those places constitute all the areas you went backpacking, bird watching, boating, wildlife viewing in Sri Lanka, or are there additional—

A. No. Probably Hikadoa. . . . I started in Columbo, backpacked down to Hikadoa—

Q. That's—

A. Backpacked and bussed.

Q. That's on the east coast of Sri Lanka, south of Columbo.

A. Down to Galle. . . . To Matera. . . . To Tangalla. . . . To Tissamaharana. . . . Up to Newara Eilya, . . .

Adams Peak, Ratnapura. . . . Badulla. . . . Up to Kandy. . . . Mahaweli River Valley. . . . Up to Sigriya. . . . Polonnaruwa. . . . And there is Polonnaruwa Wildlife – I think it is a designated wildlife sanctuary up in there where I went. . . . Polonnaruwa Wildlife Sanctuary. . . . Anuradhapura. Trinco Malee. Then I came back by a road that cuts from the east – or by train and by road – from the east coast beginning at Trinco Malee across to Puttalam, and down through Negombo, back to Columbo, and there is a wildlife refuge out in this area . . . the southeast corner, right in here, of Sri Lanka, and it begins with a W, but I have forgotten the name of it . . . to an area [on] generally bounded by – . . .

Q. Tissamaharana, Panama – . . .

A. Yes. . . . Haputale. . . .

Q. Amy, with respect to page five of your affidavit – excuse me, paragraph five of your affidavit – you said that, quote, "a purpose of my visit," unquote, was to observe wildlife. What were the other purposes of your visit to Sri Lanka?

A. Other purposes included meeting and interacting with Sri Lankans and getting to know their culture and viewing the extraordinary natural features and cultural features, natural features including the jungles and the unspoiled areas of Sri Lanka.

Q. During that trip, what – roughly, what percentage of your time did you spend observing or trying to observe wildlife? . . .

A. A rough answer? Observing wildlife was almost a daily occurrence there, from wild birds to sea turtles to other natural animals. But in trips to wildlife areas, specifically, it might have been about a third, as a rough – a third of my time spent viewing wildlife. . . .

Q. . . . Anyway, with respect to paragraph [five??*] of your affidavit –

A. Okay.

Q. —in which you discuss the Mahaweli Project, did you visit the Mahaweli Project, the actual site?

A. Yes, definitely visited the Mahaweli River and river valley, which is all east and northeast of Kandy. As for whether something was being developed right there, and whether or not I was standing on something that was the site—nothing was marked. I mean, there is no—there were no markings that said, "This is the home of the future Mahaweli Project," but I was in the Mahaweli River Valley and viewing wildlife in that area.

Q. And when during your trip was that?

A. It was a trip that I took out of Kandy, when I was in Kandy. Day what, I don't know.

Q. First part of your trip, end of your trip?

A. Oh, probably middle of the trip.

Q. How long did you spend in the Mahweli River Valley?

A. In that area, in the Kandy area, I spent, to the best of my knowledge, maybe four or five days.

Q. How did you know you were at the Mahaweli Project area?

A. That that area was the project I figured out later from reading the environmental assessment. It was the Mahaweli River. It was the Mahaweli River Valley, and that's—

Q. What stage of the project, then, would you guess that you were visiting?

A. Early.

Q. Was there any sign of development at all?

A. There could have been. There could have been. I wasn't particularly looking for something, but there could have been. . . .

Q. Do you know what endangered species are known to exist in the project area, in the Mahaweli River Valley?

A. Some of them. There is the Indian elephant, leopard, python, a crocodile. I don't know the species or the genus, but – a macaw – no, wait. A type of monkey, and several other animals. I'm not sure of the – I'm trying to think.

Q. What is your source of – the source of your knowledge for your belief that those animals inhabit the Mahaweli River Project area?

A. For the elephant and the leopard, it was communicated to me verbally when I was in Sri Lanka, that those animals existed in the Mahaweli River Valley area. There was also something written up about them in the document prepared for AID. The other animals were in the – were listed in the U.S. Court of Appeals 8th Circuit decision, and some of those I may have known were there at the time, but I'm not sure.

Q. Thanks. Do you have any knowledge of the impact of the project on the elephant and leopard that you mentioned and the other endangered species? . . . Well, what the effects of the project might be on those species? . . .

A. Yes. The effect would be largely on habitat. This is critical or important habitat for those species, especially the large species like the elephant and lion, which need a fair amount of undisturbed habitat. So the effect, the end effect may be that it diminishes the number of endangered species.

Q. And on what do you base your conclusion – those conclusions?

A. Professional experience, the effect of loss of habitat on species that need a particular type of habitat, especially large mammals. . . .

Q. Have you read studies that –

A. Yes. . . .

Tr. at 29-44.

Questioned by Mr. Pollack:

Q. Do you have any current plans, present plans to visit the Mahaweli Project in the future?

A. I intend to go back to Sri Lanka.

Q. And when?

A. I don't know. There is a civil war going on right now. I don't know. Not next year, I will say. In the future.

Q. And for what purpose would you like to go back to Sri Lanka to visit the Mahaweli Project?

A. I'd rather go back to visit the wildlife that live in the area of the Mahaweli Project, and to view wildlife in that area and other areas of Sri Lanka.

Q. . . . Once again, for Nepal, when did you go—excuse me. . . .

A. 1981.

Q. Thanks. How long did you spend there?

A. About five months.

Q. What kind of activities did you engage in in Nepal?

A. Backpacking, trekking, river rafting, wildlife viewing, tourism, cultural—I don't know what to call it—cultural experiences, and I think that's most—

Q. Does trekking mean something different than—

A. I'm sorry. Trekking or hiking or backpacking would be the same.

Q. Were you in an organized group or traveling by yourself?

A. I was not in an organized group. I began traveling with three other Americans, but spent about four and a half months traveling by myself.

Q. And then you started traveling with some people you met there?

A. No, I began traveling with some Americans, and then I traveled by myself.

Q. Okay. Where, specifically, did you engage in those activities? . . .

A. Okay. Began in Kathmandu. . . . Kathmandu up to Dumare— . . . and began a trek around the Annapurna Range.

Q. . . . Generally, how long did that trip to the Annapurna Range take?

A. The trek around the Annapurna he Range, ending in Pokhara . . . was about a month and a half.

Q. And that was early—the first part of your trip?

A. The first part of the trip. We took a trip down to Chitwan . . . National Park. It is on the border with India.

Q. And how long did you spend in Chitwan?

A. Spent a week, roughly a week in Chitwan. . . . Okay. And then went on a river trip down the Trisuli . . . River and visited Patan . . . Botan—I'm sorry. I don't now what the other place was called.

Q. May the record reflect that she is showing an area on the map from Pokhara . . . to Patan.

A. And south to the Indian border.

Q. And south to the Indian border. Does that about cover the areas that you visited?

A. Uh-huh, yes.

Q. —are you aware of any development project in Nepal which is being funded or carried out directly by a federal agency?

A. I'm aware that there are projects in Nepal that are being carried out and funded by U.S. agencies, and particularly reforestation projects.

Q. Could you—

A. I think AID is involved in them, and World Bank is involved in them. . . .

Q. . . . when you were traveling in Nepal, did you visit any U.S. funded development project in—

A. I may have, but not as a purpose of a visit. —there were reforestation projects going on throughout the areas that I visited. . . . It would have been—it would have been

sort of throughout the trips that were outside of Kathmandu, so that trip around the Annapurna Range, a trip down the Trisuli; I believe in the area around Chitwan, but I only have a general knowledge that there were those projects going on, and that I may have seen reforestation projects, but not the specifics of them.

Tr. at 46-52.

Q. Amy, to rephrase the last question before the break, in addition to the site where you saw the planted trees near Annapurna, what other sites did you visit in Nepal which you believed to be directly funded U.S. projects, U.S. development projects?

A. There were several different reforestation projects. . . . There is a dam in Pokhara that I believe was funded in part with U.S. funds.

Tr. at 57.

Questioned by Mr. Pollack:

A. Wait – in Nepal?

Q. Yes. We are talking about the two, the dam and the tree planting project. . . . What endangered species are known to exist in those areas?

A. I believe the snow leopard may exist in the area around – may or may have existed. . . .

Q. And you understand that snow leopards occur in areas near or around both of these projects?

A. I believe around the – in the Annapurna Range.

Tr. at 63.

Questioned by Mr. Pollard:

Q. All right. Do you have any present plans to visit any federally funded projects abroad other than the Mahaweli Project?

A. A better answer might be I intend to visit areas where U.S. projects may be taking place sometime in the future; foreign countries.

Q. Which projects?

A. The Mahaweli area, very likely Nepal again. I don't know specific project names, and the purpose of the visit—I mean, all I can say is that I intend to visit areas where there will be or where there probably are U.S. projects taking place just because I'd like to go back to that area, to other developing countries.

Tr. at 65-66.

Questioned by Mr. Anderson:

Q. Okay. Just to make sure that things are clear, you visited the Mahaweli Project site in Sri Lanka to observe wildlife?

A. Yes, I did.

Q. And that was in 1981-82?

A. Yes.

Q. And you confirmed later on that you were at the Mahaweli Project site by looking at the AID Environmental Assessment?

A. Yes.

Q. Were there any other federally funded projects in Sri Lanka that you may have visited?

A. I may have visited some projects, Bureau of Reclamation projects, north of Kandy.

Q. Do you know what kind of projects those were?

A. Dam projects.

Tr. at 68.

Q. Are there any federally funded foreign projects that you've studied?

A. Yes, the Polonoreste project in Brazil.

Q. What kind of a project is that?

A. It is a transmigration project and a road building project.

Q. And in what connection did you study that project?

A. Studied it in connection with my graduate studies

at Johns Hopkins, specifically to look at the effects of that project on wildlife and the environment in that area.

Q. And what did you determine would be the effects of the project on the wildlife in the area?

A. The Polonoreste project has taken place, and the effect on wildlife has been—and habitat has been large clearings of Amazon forest and settlement, which has resulted in the loss of species, many species of which were never identified.

Tr. at 69-70.

Q. With regard to all of these projects that you have either visited or have studied, how would you be harmed by the failure for there to be any consultation under the Endangered Species Act?

A. I'd be harmed both professionally and personally or emotionally. Professionally with the projects in Southeast Asia because those are areas of professional interest to me.

Q. From your degree in South and Southeast Asian studies?

A. Right. And personally or emotionally harmed because wildlife—endangered species in those areas of those projects may or would be adversely affected, resulting in the loss of more of those species or more of those animals or the whole species, and the basic knowledge that those species exist are important to me.

Q. So would it be fair to say that your interest in seeing that there is a Section 7 consultation for these projects is different than from sort of an average, ordinary person on the street?

A. Yes.

Q. And that relates to your professional and avocational interest in studying endangered species?

A. Yes, and in viewing them, as well.

Tr. at 71-72.

Testimony Regarding The Efficacy Of The Section 7 Consultation Process

Q. Are you at all generally familiar with the Section 7 consultation section of that Act?

A. Familiar, generally, yes.

Q. Do you have any particular understanding of its purposes and goals?

A. It requires, I believe, consultation between—consultation regarding any development projects using U.S. federal funds, be they national or international projects.

Q. Under your understanding, what events would trigger a requirement for consultation?

A. My understanding would be any project that had a possible effect on wildlife, either a domestic project or an international project, as long as U.S. government funds were used in that project.

Q. Would a rule-making proceeding require consultation in your understanding? . . . Do you understand what I mean when I say a "rule-making" proceeding?

A. I sort of come up with a couple definitions, so if you could—what do you mean?

Q. A policy by an executive agency, which is translated to a requirement of general applicability—

A. Yes. I would think it would require it—if you are talking about a policy or rule which would have an effect on future projects and the Endangered Species Act, yes.

Q. All right. . . . In your understanding, would a transfer of funds from the Secretary of the Treasury to another agency require consultation at that point? These are funds designated for a particular project.

A. Yes. Yes. Then yes.

Q. Would transfer of funds from the Secretary of the Treasury to the World Bank for use in a project also trigger—

A. Yes.

Q. —a consultation requirement?

A. Yes. . . .

Q. Could you briefly describe your understanding of the consultation process, who the parties might be in the consultation?

A. Consultation would take place between agencies, between—you mean—you'd have to elaborate a little bit further.

Q. Well, who might be required—who might engage in a consultation, once one takes place? . . . If the purpose of the Endangered Species Act is to assess the effect on endangered species and habitat of particular governmental actions undertaken by agencies—if that is a fair characterization of your understanding of the Act—

A. It doesn't have to be just governments. It doesn't have to be the U.S. government, actually. . . .

Q. If there is an action, can the Secretary of Interior require another federal agency to consult with the Secretary of the Interior on that action?

A. I believe he can.

Q. Do you know under what authority the Secretary of the Interior would be able to require a consultation by the other federal agency?

A. The authority of the Endangered Species Act.

Tr. at 15-20.

Q. Just to clarify and clear up any problems in the record, do you know if the Secretary of Interior can prevent a project from going forward after consultation has occurred?

A. Yes, he can. An example would be the case of the snail darter, where, after consultation has occurred, if there is a finding that there is no way to mitigate the problem or the impacts of the project, then the Secretary can prevent the project from going forward for domestic pro-

jects. On international projects, you are dealing with a foreign sovereign country, and he cannot prevent – to the best of my knowledge, he could not prevent a project from occurring in another country.

Tr. at 22-23.

Q. Do you believe that there is a connection between the Secretary's challenged regulation in this case and the Mahaweli Project?

A. Yes, I Do.

Q. And can you describe that connection?

A. The Mahaweli Project is a project that will cause the loss of habitat used by endangered species. Section 7 requires a consultation with the Fish and Wildlife Service on – where endangered species are involved in order to develop measures to mitigate the consequences on endangered species. And I believe that if such a consultation took place, mitigating measures could be implemented to prevent or to mitigate the harm to endangered species.

Q. Do you believe that –

A. – or prevent harm to any endangered species.

Tr. at 45.

Q. Do you believe that there is a connection between the Secretary's challenged consultation regulation and the projects which you have visited, specifically those two projects in Nepal?

A. Yes. To the extent that when a federally funded development project occurs in a foreign country, the Endangered Species Act requires a consultation to develop mitigating measures or to prevent harm to endangered species in that area.

Tr. at 62.

Questioned by Mr. Anderson:

Q. Okay. You mentioned that in response to one of Mr. Pollard's questions, that you didn't believe that the United States could stop a foreign project or stop a

foreign government from completing a project through a Section 7 consultation. Do you have any understanding or belief as to what benefit there would be from a consultation and international contacts under Section 7?

A. Yes. I think that foreign governments in developing countries especially are dependent on U.S. aid and aid from other developed countries, and if the United States made it clear that protecting endangered species was a priority of the American government, projects would be altered by host governments in order to protect the species, further protect the species.

Tr. at 70-72

Testimony Regarding Deponent's Familiarity With This Action.

Questioned by Mr. Pollack:

Q. Amy, what is your understanding of this particular lawsuit? Do you have any understanding of the issues involved in this lawsuit?

A. Yes. There was an agency—or there was an action by the—I guess the Department of Interior to explicitly state that agencies involved in foreign—U.S. agencies involved in foreign development projects need not consult with the Fish and Wildlife Service under the Endangered Species Act, and this lawsuit is a suit to show that, under the ESA, the, in fact—other agencies, do, in fact, need to consult with the Fish and Wildlife Service.

Q. And in your understanding, when in fact—

A. A project—

Q. —an international project that occurs within the territorial boundaries of another sovereign?

A. Yes.

Q. You said that the action challenges the Secretary of the Interior's decision, I guess, to exempt those foreign

projects from the consultation procedure. Do you know that that was a regulation that was promulgated by the Secretary of Interior that forms the challenge—

A. The basis of this—

Q. —the basis of this lawsuit?

A. Yes.

Q. When and how did you hear about the regulation which is challenged in this lawsuit?

A. I don't know an exact date, but it was while I was working at Defenders of Wildlife.

Q. Just generally—

A. How? John Fitzgerald, the endangered species specialist.

Q. You heard from Mr. Fitzgerald, who was also working for Defenders of Wildlife at that time?

A. Right.

Q. And do you know when this—

A. He first brought it up.

Q. Pardon me?

A. He first brought it up. I think that might have been when I first heard it. I don't know.

Q. Do you know when the regulation was published?

A. No, I don't. . . .

Q. Amy, did you participate in any of the rule-making procedures that eventually gave rise to this regulation?

A. If Defenders of Wildlife participated, then I was participating with them.

Q. Did you personally participate in any way?

A. As a member of Defenders of Wildlife. . . .

Q. When and how did you communicate to the Defenders that you believed you would be personally injured by the Secretary's regulation?

A. When it was brought to my attention that one of the possible problems was the Mahaweli Dam in Sri

Lanka, and I knew that I'd been to [that?] area.

Q. And who brought that to your attention?

A. John Fitzgerald, in a general way, I think, mentioned it as one of the – might have been a staff meeting or something, but the Mahaweli Dam was one of the areas that could be affected or that would be affected.

Q. Do you have any idea when that came to your attention?

A. It would be 1986.

Tr. at 23-26.

AFFIDAVIT III OF RICHARD A. DUNCAN

State of Minnesota)
) ss.
County of Hennepin)

Richard Duncan being duly sworn, states based on his knowledge, information and belief:

1. I am an attorney licensed to practice in the State of Minnesota, and currently practice with the firm of Faegre & Benson, Minneapolis, Minnesota.

2. I assembled the attachment to this affidavit, excerpts from the U.S. Agency for International Development's Congressional Presentation for Fiscal Year 1989 ("AID FY89 Report" or "the Report").

3. The AID FY89 Report consists of seven volumes and four annexes, totalling approximately 2500 pages. Counsel for plaintiffs received the AID FY89 Report on the afternoon of January 4, 1989. Due to the Report's great length, only selected excerpts have been attached.

4. The attached excerpts from the AID FY89 Report list AID projects worldwide and present specific summaries of federal agency development actions for seven countries: Botswana, Kenya, Indonesia, Sri Lanka, Thailand, Costa Rica, and Peru. Persons who have submitted affidavits on behalf of the plaintiffs in this lawsuit have testified that they have visited, are currently visiting, and/or have plans to visit these countries on personal and professional business for the purpose of studying endangered and threatened species of wildlife and their habitat (see Plaintiffs' App. Ex. Nos. 30-37); wildlife and habitat that the AID FY89 Report indicates may be affected by federal agency action.

5. Pages 1 through 7 of the attachment are true and correct copies of portions of the "Summary Tables" volume of the AID FY89 Report, specifically Table 5A,

referred to in the Report as the "All Spigots Table." This table lists "FY1987 U.S. Economic and Military Assistance – Actual Obligations" on, *inter alia,* a country-by-country basis.

6. Pages 8 through 33 of the attachment are true and correct copies of portions of Annex I to the AID FY89 Report, "Africa." The excerpts provide a "Summary of Programs by Country and Appropriation" for each African country receiving U.S. AID assistance for the years 1986-1989, and detailed individual country summaries of U.S. AID projects for Botswana and Kenya.

7. Pages 34 through 87 of the attachment are true and correct copies of portions of Annex II to the AID FY89 Report, "Asia and Near East." The excerpts provide a "Summary of Programs by Country and Appropriation" for each Asian and Near Eastern country (plus Poland) receiving U.S. AID assistance for the years 1986-1989, and detailed individual country summaries of U.S. AID projects for Indonesia, Sri Lanka, and Thailand.

8. Pages 88 through 125 of the attachment are true and correct copies of portions of Annex III to the AID FY89 Report, "Latin America and the Caribbean." The excerpts provide a summary of programs by country and appropriation for each Latin American and Caribbean country receiving U.S. AID assistance for the years 1986-1989, and detailed individual country summaries of U.S. AID projects for Costa Rica and Peru.

Dated: January 6, 1989 /s/ Richard A. Duncan
RICHARD A. DUNCAN

Subscribed and sworn to before
me this 6th day of January, 1989.

/s/ Lori J. Timm
Notary Public

58910 [SEAL]

Supreme Court of the United States

No. 90-1424

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ORDER ALLOWING CERTIORARI Filed May 13, 1991.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

May 13, 1991

Supreme Court, U.S.
FILED
JUL 12 1991
OFFICE OF THE CLERK

(5)

No. 90-1424

In the Supreme Court of the United States

OCTOBER TERM, 1991

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,
PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a)(2), requires federal agencies to insure, in consultation with the Secretary of the Interior or Secretary of Commerce (as appropriate), that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of an endangered or threatened species. Respondents, three environmental organizations, brought this suit to challenge a regulation jointly issued by the Secretary of the Interior and the Secretary of Commerce that interprets Section 7(a)(2) not to apply to actions in foreign countries. The questions presented are:

1. Whether respondents have standing to challenge the statutory interpretation embodied in the regulation, when they have not challenged any specific action in a foreign country that allegedly violates Section 7(a)(2) and have not shown that the interpretative regulation has caused any injury to their members or that any such injury would be redressed by revision of that regulation.

2. Whether, if respondents have standing, the Secretaries' construction of Section 7(a)(2) of the Endangered Species Act of 1973 as inapplicable to activities in foreign countries is reasonable and consistent with the Act, in light of the presumption against extraterritorial application of Acts of Congress.

PARTIES TO THE PROCEEDING

The petitioner is Manuel Lujan, Jr., in his official capacity as Secretary of the Interior. The respondent organizations are Defenders of Wildlife, Friends of Animals and Their Environment, and the Humane Society of the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1424

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 911 F.2d 117. The opinion of the district court (Pet. App. 21a-32a) is reported at 707 F. Supp. 1082. Prior opinions of the court of appeals (Pet. App. 33a-54a) and the district court (Pet. App. 55a-64a) are reported at 851 F.2d 1035 and 658 F. Supp. 43, respectively.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1990. A petition for rehearing was denied on December 10, 1990. Pet. App. 65a. The petition for a writ of certiorari was filed on March 11, 1991, and was granted on May 13, 1991. J.A. 331. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*, and 50 C.F.R. 402.01 and 402.02, are set forth at App., *infra*, 1a-13a.

STATEMENT

This case involves a challenge by three organizations to an administrative interpretation of the geographic scope of Section 7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1536(a)(2). Section 7(a)(2) requires "[e]ach Federal agency * * *, in consultation with and with the assistance of the Secretary [of the Interior or Commerce, as appropriate[1]], to insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical."

1. a. The Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), on behalf of the Secretary of the Interior and the Secretary of Commerce, have issued joint regulations interpreting Section 7 and announcing procedures through which they are available to consult with other agencies about actions covered by that Section. 50 C.F.R. Pt. 402 (1990). FWS and NMFS have consistently taken the position that the Secretary's responsibility under Section 7(a)(2) to designate the "critical habitat" of listed species does not apply to habitat in foreign countries. That conclusion

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[1] The ESA defines "Secretary" to mean "the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970." § 3(15), 16 U.S.C. 1532(15). The Reorganization Plan, 84 Stat. 2090, 5 U.S.C. App. 1349, generally vests responsibility for marine species in the Secretary of Commerce.

was explained in a February 13, 1976, opinion by the Assistant Solicitor of Interior for Fish and Wildlife (J.A. 174-180), and was reflected in the regulations issued by FWS and NMFS in 1978, 43 Fed. Reg. 870, which "adopt[ed] the position that critical habitat may not be determined in foreign countries." 42 Fed. Reg. 4869 (1977).

In his 1976 opinion, the Assistant Solicitor pointed out that Section 7(a)(2) expressly requires the Secretary to consult with "affected States" regarding critical-habitat designations, but makes no mention of foreign governments. He found it "inconceivable" that if Congress had intended the Secretary to make such designations in foreign countries, it would have found input from foreign governments or the Department of State unnecessary or undesirable. J.A. 175. By contrast, he continued, Section 4 of the ESA, 16 U.S.C. 1533, which authorizes the listing of foreign as well as domestic species, expressly provides for notification of and consultation with foreign governments, in cooperation with the Secretary of State (see 16 U.S.C. 1533(b)(1)(A) and (5)(B)), and Section 8, which authorizes the furnishing of financial and other assistance to foreign governments, requires the consent of the foreign governments and the cooperation of the Secretary of State (see 16 U.S.C. 1537). J.A. 175-178. The Assistant Solicitor also concluded that designations of critical habitat in foreign countries would be internationally sensitive, because the United States Government would be imposing on foreign nations its own "environmental policies and ideological orientations," as well as "a sort of land use planning policy." J.A. 178. Finally, he found that it would often be "unworkable and unreasonable" to designate critical habitats abroad, because "nearly insurmountable difficulties arise in obtaining the necessary land descriptions in foreign countries into which access is restricted." J.A. 179.

b. By contrast, FWS and NMFS initially took the position that the requirement in Section 7(a)(2) of the

ESA that federal agencies insure that actions they authorize, fund or carry out are not likely to jeopardize the continued existence of an endangered or threatened species (as distinguished from the critical habitat of such a species) *does* apply to actions in foreign countries. That initial position, which also was embodied in the joint regulations issued by FWS and NMFS in 1978 (see 43 Fed. Reg. 874, adding 50 C.F.R. 402.01), was explained in an opinion by the Associate Solicitor for Conservation and Wildlife dated April 12, 1977. J.A. 181-186. She believed that extraterritorial application was indicated because: both foreign and domestic species are listed under Section 4 (J.A. 182); the requirement that agencies insure that actions do not jeopardize protected species applies to "all" federal agencies (J.A. 182); there were general statements in the legislative history to the same effect (J.A. 182-183); and, unlike its provision for designation of critical habitat, Section 7(a)(2) does not require consultation with "affected States" concerning avoidance of jeopardy to listed species (J.A. 186). See also J.A. 164-173.

The Departments of State and Defense, as well as other agencies that fund or carry out activities in foreign countries, strongly objected to this position. They protested that this interpretation was inconsistent with the presumption against extraterritorial application of an Act of Congress; that there was no basis in the text, legislative history or purposes of Section 7(a)(2) for concluding that Congress intended to treat the duty to avoid jeopardy to endangered or threatened species in foreign countries differently from the duty to designate critical habitat of such species (which was (and is) not covered by FWS's and NMFS's interpretation of Section 7(a)(2)); and that overseas application of Section 7(a)(2) would be regarded by foreign governments as an unwarranted interference with matters within their jurisdictions. J.A. 187-191, 198-207, 217-235; 42 Fed. Reg. 4869.

In August 1979, while FWS and NMFS were considering revisions to take account of the 1978 amendments to

the ESA (Pub. L. No. 95-632, 92 Stat. 3751), the Solicitor of Interior ordered a reexamination of the extraterritoriality question. J.A. 208-209. In 1981, the Associate Solicitor for Conservation and Wildlife rendered an opinion concluding that the Interior Department's earlier interpretation had been wrong. J.A. 236-244. In his view, the domestic orientation of Section 7 was established by the text and legislative history of the intervening 1978 amendments to that Section, which permit exemptions from Section 7(a)(2) following a procedure that involves the "affected States," but make no mention of foreign governments. J.A. 239-241; see 7(e)-(*l*), 16 U.S.C. 1536(e)-(*l*). By contrast, in other sections of the ESA that *are* intended to apply in foreign countries, "Congress either expressly required consideration of the programs and policies of the affected foreign nations or mandated the involvement of the Secretary of State." J.A. 241. The Associate Solicitor also reasoned that overseas application of Section 7(a)(2) "would undoubtedly cause significant delays in administering assistance activities in foreign countries," "severely hamper the flexibility and responsiveness of American diplomacy abroad," and compromise the "confidentiality which is often a prerequisite to foreign policy initiatives, intelligence operations or military assistance." J.A. 241-242. In addition, such application would, in his view, implicate "foreign sovereignty considerations," because Section 7(a)(2) "does not establish procedures for considering and deferring to the views of foreign governments with respect to their own development priorities, or plans for fish and wildlife conservation in their own countries." J.A. 242.

This reinterpretation of Section 7(a)(2) was incorporated in joint regulations proposed in 1983 and published as a final rule in 1986. 48 Fed. Reg. 29,990; 51 Fed. Reg. 19,926. As amended, the relevant regulation states that the obligation under Section 7(a)(2) to con-

sult with FWS or NMFS applies only to activities authorized, funded, or carried out by federal agencies in the United States or upon the high seas; activities in foreign countries are not covered. 50 C.F.R. 402.01 (1990); see also 50 C.F.R. 402.02 (defining "action"). The preamble explained that the change was necessary "because of the apparent domestic orientation of the consultation and exemption processes resulting from the [1978] Amendments, and because of the potential for interference with the sovereignty of foreign nations." 51 Fed. Reg. 19,929. The preamble also noted that FWS and NMFS perform only an "advisory function under section 7" and that "the Federal agency makes the ultimate decision as to whether its proposed action will satisfy the requirements of section 7(a)(2)." *Id.* at 19,928.

2. In October 1986, respondents filed this action against the Secretary of the Interior (but not the Secretary of Commerce), seeking a declaratory judgment that the statutory interpretation expressed in the 1986 regulation is erroneous and an injunction requiring the Secretary to issue a new regulation stating that Section 7(a)(2)'s consultation obligation applies to actions in foreign countries. J.A. 12-21 (first amended complaint). On February 25, 1987, the district court granted the Secretary's motion to dismiss for lack of standing. Pet. App. 55a-64a. The court first rejected respondents' effort to base their standing on allegations concerning their members' generalized interest in observing endangered and threatened species and their resulting interest in proper enforcement and administration of the ESA. See J.A. 13. The court found that theory inconsistent with this Court's decisions. Pet. App. 59a-60a (citing *Allen* v. *Wright*, 468 U.S. 737, 754 (1984), and *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 483-484 (1982)).

Respondents—"[a]pparently realizing the standing deficiencies in their complaint"—had also identified eight projects in foreign countries that allegedly were harming

endangered species. Pet. App. 60a-61a, 63a. Respondents observed that under the interpretation of Section 7 (a)(2) embodied in the 1986 regulation, the agencies concerned would not have a duty to consult with the Secretary about them. *Id.* at 61a. As to the projects remaining relevant to this case—the Mahaweli Project in Sri Lanka (which involves construction of dams and irrigation works on the Mahaweli River and is assisted in part by the Agency for International Development (AID)), and the Aswan High Dam Project on the Nile River in Egypt (which involves rehabilitation of the Dam's power-generating works and is assisted by the Bureau of Reclamation)—respondents contended that they had standing because one member of respondent Defenders of Wildlife (Defenders) had once visited the general location of each of those projects and hoped someday to return.[2]

The district court held that these projects did not "provide a sufficient basis for showing an actual or threat-

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[2] The district court noted that only three of the eight projects respondents identified were "actually being funded or carried out by federal agencies." *Id.* at 61a. The third project the court initially cited—the Picchis-Palcazu forestry project in Peru, which was once assisted by AID (see Pet. App. 63a)—was subsequently held by the court of appeals to be insufficient to confer standing because a member of Defenders "came only within several hundred miles" of the project and therefore could not establish any injury resulting from it. *Id.* at 9a n.2; see Gov't C.A. App. 123, 126. AID's field activity on that project ceased in 1988 due to security conditions in Peru, and AID's participation in it ended altogether in September 1990. Affidavit of James S. Hester (Gov't C.A. Reply Br. Addendum, at 14).

As the district court pointed out, Pet. App. 61a n.6, two other projects identified by respondents had been either halted or completed, and two others were funded by the World Bank, which both courts below held not to be a federal agency for purposes of Section 7. *Id.* at 44a, 61a n.6. The district court found that the last of the eight projects, the Lower Mekong Project, was merely being planned by the Bureau of Reclamation and therefore would not trigger Section 7 in any event. *Id.* at 61a.

ened injury traceable to the Secretary's reinterpretation of Section 7." Pet. App. 62a. It pointed out that "the final decision of whether to proceed or continue with a project lies with the acting agency," not the Secretary; yet respondents had "not sought to enjoin the agency action that they contend is allegedly causing them harm," but instead sought to "have the court construe the ESA in the abstract." *Id.* at 63a. As a result, if the court determined that the Secretary's interpretation of Section 7(a)(2) is erroneous—and if the agencies concerned did not then voluntarily initiate consultation—"[respondents] would have to bring a second lawsuit to enjoin the agency action as it relates to those particular projects." *Id.* at 63a-64a. Thus, the court concluded, respondents "failed to request a remedy that will redress the injury [they are] relying on to show standing." *Id.* at 63a.

3. a. A divided panel of the court of appeals reversed and remanded. Pet. App. 33a-54a. It concluded that respondents had pleaded sufficient injury-in-fact for Article III purposes on either of two theories. *Id.* at 40a-44a. First, the court believed that Defenders had adequately alleged that the projects visited by its members were increasing the rate of extinction of endangered species. *Id.* at 41a-42a. Second, it held that respondents had pleaded a "procedural harm" based on an asserted violation of "procedural rights" under the ESA—namely, respondents' asserted rights, in light of their interest (and that of their members) in the administration of the ESA, to have federal agencies consult with one another about possible injury to a listed species. *Id.* at 42a-44a.

The court of appeals further held that respondents satisfied the additional Article III requirements of showing that the injury they allege "'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" Pet. App. 38a (quoting *Valley Forge Christian College*, 454 U.S. at 472, and *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)); see Pet. App. 44a-50a. The court first con-

cluded that Defenders could rely on the proposition, which it found "[i]mplicit" in Defenders' allegation of "procedural injury," that an agency's failure to consult with the Secretary would create a "risk" that the agency might overlook harm to endangered species. *Id.* at 46a.[3]

The court next rejected the Secretary's contention that the traceability and redressability required by *Allen* v. *Wright*, *supra*, and related cases are nevertheless lacking here because: (1) it is "mere speculation" that Section 7 consultation would have made any difference in the design of the projects, since AID had conducted an environmental assessment of two of the three projects and brought about changes that benefited endangered species (see note 22, *infra*); (2) it is up to the agency concerned to decide whether to consult with the Secretary, and the interpretation of Section 7(a)(2) in the Secretary's regulation (or any court-ordered revision thereof) would not require or forbid any action agency to seek advice from FWS or to make any particular decision about a given project; and (3) the final design of a foreign project depends on the independent actions of the foreign government. Pet. App. 47a-50a. The court of appeals dismissed these objections with the observation that this case is "more like" *United States* v. *SCRAP*, 412 U.S. 669 (1973), where standing was found despite a "rather tenuously linked chain of causation," than like *Allen* v. *Wright*. Pet. App. 48a-49a. The court also believed that "Congress itself ha[d] legislated the requisite causation and redressability" by determining that "consultation between the Secretary and the action agency" is the "remedy" for the alleged "harm" to the "personal, professional, and aesthetic interests" of Defenders' members. *Id.* at 49a, 50a.

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[3] Although the court recited the Secretary's submission that there was no indication that the projects respondents identified would actually harm endangered or threatened species, it held that Defenders' standing did not depend on proof of such harm. Pet. App. 46a.

Finally, the court held that respondents were not required to seek injunctive relief against action by federal agencies whose projects in foreign countries allegedly would harm protected species, rather than against the Secretaries' interpretative regulation. Without elaboration, the court stated it was "satisfied" that an injunction requiring the Secretary to revise the regulation "would result in consultation, which in turn would foreclose the possibility that serious harm to an endangered species will be overlooked." Pet. App. 50a.

b. Judge Bowman dissented from what he termed the majority's "slightly surrealistic" holding that respondents have standing. Pet. App. 51a. He found the alleged causal link between the new interpretative regulation and any harm to endangered species in foreign countries "far too speculative, attenuated, and remote to support standing," because the ESA does not give the Secretary of the Interior either "the power to order an action agency to comply with his requests or to veto its decision," or "any power to direct the actions or decisions of a foreign country." *Ibid.* For the same reason, Judge Bowman believed that respondents did not satisfy the redressability requirement for standing, because even if the Secretary were required to revise the regulation, "the action agency and the host nation still would be legally entitled to exercise their independent judgment concerning proposed projects," and it was "entirely speculative" whether the host nation would seek aid elsewhere. *Id.* at 52.

4. On remand, the Secretary moved for summary judgment on the question of standing, after taking the depositions of several members of the respondent organizations who had allegedly suffered injury. Respondents made no attempt to bolster the factual record on standing; they simply moved for summary judgment on the merits. On February 15, 1989, the district court granted respondents' motion. Pet. App. 21a-32a. Although the court acknowledged that respondents must affirmatively prove

their standing at the summary judgment stage, it "fe[lt] that the Eighth Circuit ha[d] already determined the standing question in this case" when it reversed the district court's order granting the Secretary's motion to dismiss, and that "[t]he new 'proof' and arguments offered by the Secretary [did] not vary the situation enough to merit an analysis different from that given by the Eighth Circuit." *Id.* at 24a-25a. On the merits, the district court disagreed with the interpretation in the 1986 regulation and held that the consultation requirement in Section 7(a)(2) applies to activities in foreign countries. Pet. App. 25a-30a. The court therefore ordered the Secretary to publish regulations "clearly recognizing the full mandate" of Section 7 as requiring each federal agency to consult with the Secretary on projects that may affect endangered or threatened species, wherever found. *Id.* at 31a.

5. The court of appeals affirmed. Pet. App. 1a-20a. In holding that Defenders has standing, the court cited affidavits of two of Defenders' members that, in its view, showed that they "had visited, and planned to visit again, the endangered species or their habitat in the areas that may be affected by" the Mahaweli Project in Sri Lanka and the Aswan High Dam in Egypt. *Id.* at 7a. The court further held that even if none of its members had such a "geographical nexus" to foreign projects that might harm endangered or threatened species, Defenders had satisfied Article III standing requirements by demonstrating a "procedural injury" based on "the Secretary's failure to follow the required consultation procedure." *Id.* at 9a-10a. In the court's view, the "ambitious purpose" of the ESA, and the existence of its citizen-suit provision (§ 11(g), 16 U.S.C. 1540(g)), indicated that Congress "intended to bestow procedural rights upon environmental organizations such as Defenders." Pet. App. 10a-11a.

On the merits, the court of appeals held that Section 7(a)(2) should be construed to apply to activities in

foreign countries. Pet. App. 11a-20a. Although recognizing that statutes are presumed to have only a domestic scope and that this presumption may be overcome only by a "clear expression of congressional intent," *id.* at 13a, 19a, the court believed that a congressional intent to apply Section 7(a)(2) to activities in foreign countries could be "gleaned" from *other* sections of the ESA (Pet. App. 15a): the prefatory declarations in Section 2 that the United States had pledged itself in the international community to conserve various species and had entered into international agreements to that end (16 U.S.C. 1531(a)(4) and (5)); the provision in Section 4 for the Secretary to list species in a foreign country, taking into account the views and conservation efforts of its government (16 U.S.C. 1533(b)(1)(A), (1)(B) and (5)(B)); and the authorization in Section 8, entitled "International cooperation," for furnishing assistance to foreign nations in conserving endangered and threatened species (16 U.S.C. 1537). Pet. App. 13a-15a.[4]

The court of appeals did not dispute the Secretary's representation that overseas application of Section 7(a)(2) would have adverse consequences for the Nation's foreign relations, since it would be regarded "as an intrusion upon the sovereign right of foreign nations to strike their own balance between development of natural resources and protection of endangered species." Pet. App. 20a. But the court concluded that although "Congress may decide that its concern for foreign rela-

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[4] The court rejected the Secretary's contention that it is through Section 8 (as well as Section 9, 16 U.S.C. 1538, which prohibits the taking and importation of, and trade, in listed species)—not through extraterritorial application of Section 7(a)(2)—that Congress addressed the conservation of endangered or threatened species in foreign countries. Pet. App. 14a-15a. The court also believed that when Congress amended the ESA in 1978, it gave "tacit approval" to the initial administrative interpretation that Section 7(a)(2) applies overseas. Pet. App. 17a.

tions outweighs its concern for foreign wildlife," the court would not make such a decision on Congress's behalf. *Ibid.*[5]

SUMMARY OF ARGUMENT

I. Respondents have failed to show that their members satisfy Article III standing requirements. There is no proof that any members have been injured in their ability to observe endangered or threatened species abroad, that any such injury could fairly be traced to the interpretative regulation respondents challenge, or that the injury is likely to be redressed by a decision in respondents' favor. A member of Defenders of Wildlife once visited the Mahaweli River and Nile River, where the governments of Sri Lanka and Egypt have projects assisted by the United States, and expressed a vague intent to return at some unspecified time in the future. But there was no showing that either project affected the member's ability to observe endangered or threatened species or would be likely to do so in the future, that any such injury could fairly be traced to assistance furnished by the United States or to failure by the responsible federal agency to consult with the Secretary under Section 7(a)(2), or that any injury would be redressed by such consultation or the withholding of U.S. aid.

Moreover, respondents' challenge is directed not to the projects in Sri Lanka and Egypt, but to the administrative interpretation of Section 7(a)(2) in the advisory regulation issued by the Secretaries of the Interior and Commerce. As a result, the elements of causation and redressability are even more attenuated, because action agencies are not bound by that regulation (or any court-ordered revision thereof). In addition, critical decisions

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[5] The Secretary's petition for rehearing, with suggestion of rehearing en banc, was denied on December 10, 1990, with two judges dissenting. Pet. App. 65a. On January 7, 1991, the court of appeals stayed its mandate pending certiorari. J.A. 10.

about projects such as those in Sri Lanka and Egypt are made not by the action agencies, but by the foreign governments concerned. Especially in light of the respect due the independent judgments of a foreign sovereign, respondents have not shown that any impact an overseas project might have on a given species may fairly be traced to assistance rendered by the United States or would be redressed by either consultation about the project within the United States Government or its withholding of further assistance.

There is no merit to the court of appeals' alternative holding that respondents have standing on the theory that they suffered a "procedural injury" as a result of the failure by federal agencies to engage in consultation under Section 7(a)(2). That Section does not purport to confer a right on private parties to have federal agencies consult with one another about a proposed project. In any event, the requirements of injury-in-fact, causation, and redressability stem directly from Article III, and could not be dispensed with by such a statute.

II. The court of appeals' holding on the merits cannot be squared with the established presumption that Acts of Congress do not apply in foreign countries, absent a clearly expressed intention to the contrary. See *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227 (1991). Far from exhibiting a clearly expressed intent to apply to actions overseas, the text of Section 7(a)(2) itself, which refers to "affected States" but not foreign nations, has a domestic focus. That focus is confirmed by the ESA's provisions for granting exemptions from Section 7(a)(2), which provide for participation by affected States but not foreign governments. Other Sections of the ESA show that Congress chose cooperation with and the furnishing of aid to foreign governments, as well as the negotiation of agreements—not unilateral imposition of this Nation's environmental standards—to address international aspects of the endangered species problem. Those Sections, as well as the carefully reticulated pro-

visions of Section 9 that prohibit certain overseas (as well as domestic) trade in endangered species, show that when Congress wanted to reach activities in foreign countries, it expressly so provided, and thereby avoided wholesale application of the Act overseas. In addition, the legislative history shows that Section 7(a)(2) was always considered in the context of domestic projects and that Congress understood that the problem of species depletion in other countries would be addressed through international cooperation.

The presumption against extraterritorial application takes on added force in the present context, because of the danger that extraterritorial application of U.S. law will not only clash with foreign law and affront the foreign government concerned, but also interfere with the Executive Branch's conduct of foreign affairs. Moreover, the uniform interpretation by the Secretaries of the Interior and Commerce, and by the Executive Departments and agencies that conduct activities overseas, that Section 7(a)(2) does not apply to actions in foreign countries is at the very least reasonable, and it therefore should be sustained under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984).

ARGUMENT

I. RESPONDENTS LACK STANDING BECAUSE THEY FAILED TO SHOW THAT THEY SUFFERED INJURY-IN-FACT THAT WAS CAUSED BY THE CHALLENGED INTERPRETATIVE REGULATION AND THAT WOULD BE REDRESSED BY REVISION OF THE REGULATION TO STATE THAT SECTION 7(a)(2) OF THE ENDANGERED SPECIES ACT APPLIES TO PROJECTS IN FOREIGN COUNTRIES

The courts below considered the geographic reach of Section 7(a)(2) of the Endangered Species Act (ESA) in the context of an abstract dispute over an advisory regulation promulgated by the Secretary of the Interior and Secretary of Commerce to assist other agencies in carrying out their responsibilities under that Section; this exercise in the world of the abstract and hypothetical was far removed from the context of an actual controversy over a specific action in a foreign country to which the obligations of Section 7(a)(2) assertedly attach. To make matters worse, the court of appeals required the Secretary to promulgate a new interpretative regulation incorporating the court's expansive view of Section 7(a)(2), even though respondents were unable to show that the existing regulation had actually affected any particular project in a foreign country—and even though the court was powerless to prevent whatever harm to endangered or threatened species might result from such a project. This is a classic example of an advisory opinion—the forbidden fruit in the Article III garden. *Muskrat* v. *United States*, 219 U.S. 346, 354-358 (1911); Correspondence of the Justices, *reprinted in* 3 *The Correspondence and Public Papers of John Jay* 486-489 (H. Johnston ed. 1891).

Article III "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded," as well as " 'the proper—and

properly limited—role of the courts in a democratic society.'" *Allen* v. *Wright*, 468 U.S. at 750 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)). It confines the jurisdiction of the federal courts to actual "Cases" and "Controversies." Many of the limitations imposed by this bedrock requirement are distilled in the core doctrine of standing. Under that doctrine, a plaintiff first must establish a personal injury-in-fact. The requisite injury cannot be "abstract," "hypothetical," or "conjectural," *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974); *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-102 (1983); it must be "distinct and palpable," *Warth* v. *Seldin*, 422 U.S. at 501, or "certainly impending," *Babbitt* v. *United Farm Workers*, 442 U.S. 289, 298 (1979). See *Whitmore* v. *Arkansas*, 110 S. Ct. 1717, 1723, 1725 (1990). Only a plaintiff who identifies this sort of concrete injury-in-fact has "'such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth* v. *Seldin*, 422 U.S. at 498-499 (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)). In addition, "the litigant must satisfy the 'causation' and 'redressability' prongs of the Art. III minima by showing that the injury 'fairly can be traced to the challenged action,' and 'is likely to be redressed by a favorable decision.'" *Whitmore* v. *Arkansas*, 110 S. Ct. at 1723 (quoting *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 38, 41); accord *Renne* v. *Geary*, No. 90-769 (June 17, 1991), slip op. 6; *International Primate Protection League* v. *Administrators of Tulane Educational Fund*, 111 S. Ct. 1700, 1704 (1991); *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661, 1667 (1991); *Allen* v. *Wright*, 468 U.S. at 751, 757-759.

Respondents satisfy none of these requirements: they have failed to prove any concrete injury-in-fact, much less one that was caused by the administrative interpretation embodied in the 1986 regulation or that would be

redressed by a court-ordered revision of that interpretation. Nor, contrary to the court of appeals' holding, can respondents avoid satisfying these requirements by relying on a supposed "procedural injury," resulting from their asserted interest in having federal agencies consult with one another about possible harm to endangered species. This Court has repeatedly held that a generalized interest in having the government comply with the law is insufficient to confer standing to challenge government action. As the district court observed in its first opinion in this case, when it dismissed the complaint for lack of standing (Pet. App. 58a): "The power to declare the rights of individuals and to measure the authority of governments . . . 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy.'" *Valley Forge Christian College*, 454 U.S. at 471 (quoting *Chicago & Grand Trunk R.R.* v. *Wellman*, 143 U.S. 339, 345 (1892)).

A. Respondents Have Not Proven Their Standing Based On Past Visits By Their Members To The Vicinity Of U.S.-Assisted Projects in Foreign Countries And The Members' Vague Expression Of Intent To Return Sometime In The Future

As this Court has repeatedly held, "[w]e presume that federal courts lack jurisdiction 'unless the contrary appears affirmatively from the record.'" *Renne* v. *Geary*, slip op. 3 (quoting *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 546 (1986), and *King Bridge Co.* v. *Otoe County*, 120 U.S. 225, 226 (1887)); accord *FW/PBS, Inc.* v. *City of Dallas*, 110 S. Ct. 596, 608 (1990) (standing must "affirmatively appear in the record"). Accordingly, respondents had the burden at the summary judgment stage affirmatively to prove their standing to sue. See *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. 3177, 3186-3189 (1990); see also *Gladstone, Realtors* v.

Village of Bellwood, 441 U.S. 91, 115 (1979).[6] Respondents failed to do so.

Respondents brought this case as a facial challenge to an interpretative regulation. The court of appeals permitted that facial challenge to proceed because respondents identified two projects—the Mahaweli Project in Sri Lanka and the Aswan Dam Project in Egypt—that had not been the subject of formal interagency consultation in the past and would not be in the future under the interpretation contained in the regulation. Pet. App. 7a. But respondents' speculation about those projects falls far short of establishing their standing here.

1. As an initial matter, even if the two projects were at issue in this case, respondents would not have standing to challenge them. Under *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), Defenders' standing would depend on proof that at least one of its members had standing. See *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. at 3187. Defenders did not make such a showing.[7]

a. Joyce Kelly, a member of Defenders who visited Egypt in May 1986, simply stated in her affidavit that

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[6] By contrast, when the Secretary moved to dismiss the complaint under Fed. R. Civ. P. 12(b) for lack of standing, the courts below were required to presume that the general allegations in the complaint embraced the specific facts necessary to support respondents' claim. *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. at 3189. This Court's decision in *SCRAP*, on which the court of appeals relied (Pet. App. 42a, 48a-49a), involved a motion to dismiss, not a motion for summary judgment. Accordingly, the *SCRAP* decision, "whose expansive expression of what would suffice for [5 U.S.C.] 702 review under its particular facts has never since been emulated by this Court," is of no relevance here. *Lujan*, 110 S. Ct. at 3189.

[7] The court of appeals found standing based on supposed injury to the two Defenders members. Pet. App. 9a n.2. The court did not hold that the other two respondent organizations had proven injury to any of their members. Those respondents therefore do not have standing under *Hunt*.

she "observed the habitat of the endangered nile crocodile" in Egypt (although she did not claim actually to have seen any crocodiles); that she "intended to do so again" (although she did not say when) and "hope[d] to observe the crocodile directly"; and that in the meantime she "appreciate[d] its existence in the Nile River system." J.A. 100-101. The court of appeals relied on Kelly's vague assertion (J.A. 101) that she would "suffer harm" as a result of the Aswan High Dam Project. Pet. App. 8a. But this is fanciful; Kelly did not state that the project—which, according to the publication Kelly cited, consists solely of rehabilitating the Dam's existing powerplant (see Bureau of Reclamation, *Water for the World* 8 (1986) (J.A. 65))—would have any effect on the continued existence of the Nile crocodile. See J.A. 101.[8] *A fortiori*, Defenders failed to prove that Kelly had suffered or would suffer any injury that could fairly be traced to assistance rendered by the Bureau of Reclamation to rehabilitation of the powerplant or to the Bureau's failure to engage in formal consultation with FWS. Defenders likewise failed to prove that any such harm would be remedied by either formal consultation between the Bureau and FWS or the withholding of any remaining Bureau assistance to the Project.

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[8] The court of appeals recounted that "Kelly stated that she had observed the traditional habitat of the Nile crocodile at the Aswan High Dam project in Egypt." Pet. App. 9a n.2. In fact, Kelly's affidavit avoided any claim that she ever visited the Dam itself, and she did not state that the crocodile actually lives at or near the Dam. J.A. 101. Kelly also stated, without elaboration, that she would suffer harm as a result of assistance rendered by the Bureau of Reclamation to Egypt's Ministry of Irrigation in developing a master water plan. J.A. 101. The Bureau publication *Water for the World* states that the master plan "will serve as a comprehensive guide for developing and managing Egypt's water resources." J.A. 66. It does not suggest that any harm to listed species would result from implementation of the plan.

b. Amy Skilbred, who became a member of Defenders in 1985 (J.A. 144), stated in her affidavit (J.A. 144-146) and deposition (J.A. 309-328) that she traveled to Sri Lanka in 1981-1982 and visited, *inter alia*, the Mahaweli River Valley. J.A. 144-145, 313, 316, 321. However, she did not see any evidence of the Mahaweli Project or even know of its existence at the time (J.A. 316, 327-328)[9] and apparently did not see any endangered or threatened species. J.A. 145, 146, 317. Skilbred also stated that she intended to go back to the Mahaweli Valley "sometime in the future" (J.A. 320-321) and hoped to see the endangered elephant and leopard, although she could not say when, especially in light of the civil war in Sri Lanka. J.A. 144-145, 318, 320-321. Moreover, although Skilbred stated that the Mahaweli Project would reduce the *habitat* of endangered and threatened species (J.A. 145; see also J.A. 325), she did not cite specific evidence that the Project would actually be likely to jeopardize the continued existence of any such species. She stated only that the loss of habitat "may" have that effect. J.A. 145, 317.[10] Nor did Skilbred tie her generalized speculation about the possible impact of the Project to particular species in any discrete area she visited or to the particular portion of the overall Mahaweli Project that was receiving AID funds.[11]

Skilbred likewise did not show (and Defenders did not otherwise prove) that any harm to endangered or threat-

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[9] Skilbred stated in her deposition that she "figured out later"—apparently in 1986—that the Mahaweli River Valley was the site of a project when she read the environmental assessment prepared by AID for the project. J.A. 316. She then knew that "area" was one she had visited. J.A. 327-328.

[10] Those equivocal assertions, even if true, would not establish a violation of Section 7(a)(2), because Section 7(a)(2) requires a federal agency to insure only that any action it authorizes, funds, or carries out is not "likely" to jeopardize the existence of a listed species.

[11] AID has funded construction in only one of the four "systems" into which the Mahaweli Project is divided. J.A. 211.

ened species that might result from the Project could fairly be traced to AID assistance (which amounted to only $170 million of an overall cost of $2.3 billion (J.A. 159)) or to AID's failure to engage in formal consultation with FWS under Section 7(a)(2). In fact, the record shows that even though AID took the position that Section 7(a)(2) did not apply to AID-assisted projects in foreign countries (and that AID therefore declined to engage in formal consultation pursuant to that Section), AID nevertheless funded an environmental assessment of the entire Mahaweli Project pursuant to its own environmental regulations (see 22 C.F.R. Pt. 216; Pet. App. 47a), actively assisted the Government of Sri Lanka in preventing harm to protected species in the Project area, and conferred extensively (albeit informally) with FWS in doing so. J.A. 78-89, 210-216.[12] It there-

[12] In support of its motion to dismiss, the government filed an affidavit of Norman Cohen, the Environmental Coordinator in AID. J.A. 158-160. He explained that AID's involvement with the Mahaweli Project (and the Pichis-Palcazu Project in Peru) "demonstrates that A.I.D. has been and is extremely sensitive to the environmental impacts of its projects, including their effect on endangered species" (J.A. 159). He continued (*ibid.*):

> [The AID-funded environmental] assessment showed that the [Mahaweli] project could affect several endangered species. Accordingly, A.I.D. worked with the Government of Sri Lanka to establish four new nature reserves and associated infrastructure and training programs within the project area. In June 1984, the Administrator of A.I.D. received a letter of appreciation from the World Wildlife Fund for helping to promote environmental protection programs in Sri Lanka such as the Mahaweli nature preserves.
>
> The Pichis-Palcazu forestry project in Peru was designed, in part, to maintain the natural rain forest and its flora and fauna (including endangered species). The Government of Peru had originally proposed opening huge tracts of forest in eastern Peru for colonization and intensive development. Such colonization would have effectively wiped out the habitats of many local species. A.I.D. environmental and project officers conducted an environmental assessment according to A.I.D. environmental regulations and convinced the Peruvians that no further colonists should settle in the valley and redesigned the project ac-

fore is entirely likely that any adverse environmental consequences of the Project would have been *more* severe if AID had not participated. For similar reasons, Defenders failed to prove that any injury to its members would be remedied by further consultation between AID and FWS, or by withholding any remaining AID assistance to the Project.

c. In sum, Defenders utterly failed to show that past failures by action agencies to engage in formal consultation with FWS under Section 7(a)(2) contributed to specific harm to its members' ability to view endangered or threatened species along the Mahaweli or Nile River. Any injury that Kelly or Skilbred might have suffered on their visits to Sri Lanka and Egypt in 1982 and 1986 could not be remedied in this suit in any event, since respondents seek only prospective relief, not damages. Cf. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105 & n.6 (1983).

In order for Defenders to have standing to seek prospective relief, it would have to prove more than that its members had been injured by the impact of the challenged agency action on their ability to view listed species at some point in the past (even if we assume, arguendo, that Defenders made such a showing); it would have to establish a "real and immediate" threat of further injury. *City of Los Angeles* v. *Lyons*, 461 U.S. at 102-103; *O'Shea* v. *Littleton*, 414 U.S. 488, 496-497 (1974); accord *Renne* v. *Geary*, slip op. 7. To do so, Defenders would be required to show, *inter alia*, that its members are currently engaged in on-going visits to the sites where the species in question could be viewed (and where the members therefore would personally suffer the injury that allegedly can be traced to the challenged governmental conduct)[13]—or, perhaps, that such visits will definitely

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cordingly. The assessment included several technical reports on the projects' impact on local flora and fauna that were carefully considered by A.I.D. and the Government of Peru when redesigning the project.

[13] Compare *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. at 3187-3188 (organization's member avers that her "use" and "enjoyment"

occur in the immediate future, so that whatever personal injury might ensue is "certainly impending." *Whitmore* v. *Arkansas*, 110 S. Ct. at 1723, 1725 (quoting *Babbitt* v. *United Farm Workers*, 442 U.S. at 298).

In this case, however, Defenders' two members simply expressed a general desire to return to the areas of the Nile and Mahaweli Rivers at some unspecified time in the future, and an unsubstantiated fear that an absence of consultation between the agencies concerned and FWS in the interim would injure them *if* they returned. That showing would be wholly insufficient even if respondents had sought injunctive relief against the Bureau of Reclamation and AID requiring them to consult with FWS (or withhold assistance from the projects), since standing depends on injury that is "actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore* v. *Arkansas*, 110 S. Ct. at 1723. If such generalized expressions of intent were alone sufficient, the plaintiff organizations in *Lujan* could have established standing simply by finding members who were willing to represent that they intended, someday, to visit all the millions of acres there at issue. Thus, contrary to the court of appeals' view (Pet. App. 9a n.2), respondents' showing of injury was not stronger —it was weaker and more speculative—than that found inadequate in *Lujan*.

2. Respondents did not, however, even seek relief directed against the particular projects on which they relied to establish injury. They instead sought to require the Secretary to rescind a non-binding regulation interpreting Section 7(a)(2) and to issue a new, equally non-

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of lands "have been and continue to be adversely affected in fact"); *id.* at 3189 (one of organization's members "uses" the land); *Sierra Club* v. *Morton*, 405 U.S. 727, 735 (1972) (alleged injury will be suffered only by those who "use" the affected areas); cf. *Japan Whaling Ass'n* v. *American Cetacean Society*, 478 U.S. 221, 231 n.4 (1986) (organizations adequately alleged injury-in-fact because the apparently on-going "whale watching and studying of their members will be adversely affected by continued whale harvesting").

binding regulation articulating a broader interpretation. This feature further attenuates the elements of causation and redressability. In the first place, the regulation respondents challenge became effective on July 3, 1986 (see 51 Fed. Reg. 19,926), *after* Kelly and Skilbred visited the Nile and Mahaweli Rivers. Any injury they might have suffered at that time therefore could not fairly be traced to the regulation.

More fundamentally, as FWS and NMFS made clear when they promulgated the 1986 regulation (see page 6, *supra*), action agencies are ultimately responsible for making their own decisions about what is required of them under Section 7(a)(2). See also *National Wildlife Fed'n* v. *Coleman*, 529 F.2d 359, 371 (5th Cir.), cert. denied, 429 U.S. 979 (1976); *Sierra Club* v. *Froehlke*, 534 F.2d 1289, 1303-1304 (8th Cir. 1976); cf. *TVA* v. *Hill*, 437 U.S. 153, 186 n.31 (1978). As a result, even if the 1986 interpretative regulation is revised (as the court of appeals ordered), federal agencies would remain free to decide whether to follow Section 7(a)(2)'s standards and procedures in connection with projects in foreign countries. In fact, while the prior regulation interpreting Section 7(a)(2) to apply overseas was still in effect, AID specifically declined to engage in formal consultation with FWS about the Mahaweli Project under Section 7(a)(2). J.A. 79, 80, 214. There is, accordingly, no basis for concluding that reinstatement of that interpretation would cause action agencies to apply Section 7(a)(2) to projects in other countries.[14] Thus, in Administrative Procedure Act terminology, respondents are not "adversely affected" by the particular "agency action" (the interpretative regulation) they challenge. 5 U.S.C. 702; *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. at 3185-3186. If respondents ever could show injury in APA and Article III terms, it

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[14] The district court recognized in its initial opinion (Pet. App. 63a-64a) that even if respondents succeeded in changing the interpretation embodied in the regulation, they might have to bring a second suit to challenge particular agency action.

would only be when an agency actually took action. As this Court emphasized in *Lujan*, "[u]nder the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm." 110 S. Ct. at 3190.[15]

In addition, the critical decisions regarding projects such as those cited by the court of appeals are not made by the action agencies of the United States Government; to state the obvious, those decisions are made by the respective foreign governments. The Mahaweli Project, for instance, involves twelve donors besides AID, which is furnishing less than 10% of the expected cost. J.A. 159. There could be no assurance that the Government of Sri Lanka would redesign or stop the Project even if AID threatened to terminate funding due to endangered species concerns raised during consultations with FWS. In such situations, host countries may simply turn to other donors that do not place rigid restrictions on their funds.[16]

Thus, the causal connection between the interpretative regulation and the asserted injury to Defenders' mem-

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[15] The Court also reaffirmed in *Lujan* that where, as here, there is no special statute authorizing immediate judicial review of regulations, a challenge to a regulation ordinarily is not ripe "until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." 110 S. Ct. at 3190. Here, respondents have not proven any concrete application of the interpretation reflected in the regulation that threatens to harm them. While respondents may prefer to seek "wholesale correction" of what they view as an incorrect interpretation of the law by all departments and agencies in the Executive Branch, a "case-by-case approach * * * is the traditional, and remains the normal, mode of operation of the courts." 110 S. Ct. at 3191; see *Renne* v. *Geary*, slip op. 10; *Allen* v. *Wright*, 468 U.S. at 759-760.

[16] This potentiality is illustrated by the statement of one of Defenders' members, who criticized the environmental effects of a project in Thailand but noted that the Thai Government was committed to going forward with the project and would probably seek money from Japan or Germany if money were not available from existing sources (in that case, the World Bank). J.A. 126.

bers is "highly indirect," hinging as it does on the independent actions of two sets of third parties not before the court. *Whitmore* v. *Arkansas*, 110 S. Ct. at 1725; *Allen* v. *Wright*, 468 U.S. at 757; *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 42; *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. at 3190 & n.3. And the prospect of redress is correspondingly speculative. That is especially so because the independent actors here are not mere private parties, but rather agencies of the United States Government and foreign governments "whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.).

Indeed, respondents seek to affect projects on foreign soil undertaken by foreign sovereigns that must be regarded by United States courts as entirely proper under those sovereigns' own laws. See *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp.*, 110 S. Ct. 701, 704-705 (1990); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 303 (1918); *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). Proper respect for the independent judgment of foreign sovereigns requires that a United States court not undertake to determine whether decisions by a United States agency regarding assistance rendered to a project implemented by a foreign government within its own territory are sufficiently likely to lead to a particular response by that government to satisfy the causation and redressability minima for Article III standing. See *Cardenas* v. *Smith*, 733 F.2d 909, 914 (D.C. Cir. 1984); *Greater Tampa Chamber of Commerce* v. *Goldschmidt*, 627 F.2d 258 (D.C. Cir. 1980). That conclusion is compelled by the principle of separation of powers that underlies Article III standing doctrine (see *Allen* v. *Wright*, 468 U.S. at 751-752, 759-760), because the Constitution commits the power over foreign affairs to the political Branches, not Article III courts; and it specifically commits to the Executive Branch the prediction and assessment of reactions by foreign governments to actions of the United States Government, as part of the diplomatic

process and the broader role of the President as the "sole organ of the nation in its external relations, and its sole representative with foreign nations." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).[17]

The court of appeals erred in nevertheless finding standing on the rationale that Congress could simply "legislate[] the requisite causation and redressability" and had done so here by "determin[ing] that the remedy for the harm to the[] members' personal, professional, and aesthetic interest in endangered species is consultation between the Secretary and the action agency." Pet. App. 49a-50a. There is no basis in the ESA for respondents' self-centered vision of Section 7(a)(2): that provision was designed to prevent harm to certain species of plants and animals, not to "remedy" injuries to the "interests" of [illegible] beings or the organizations to which they belo[illegible] novel theory advanced by respondents and the court of appeals therefore fails as a statutory matter. But in addition, the requirements of causation and redressability stem directly from Article III, *Whitmore* v. *Arkansas*, 110 S. Ct. at 1722-1723 & n.1; *Valley Forge Christian College*, 454 U.S. at 472, and thus cannot be waived by Congress. See *Warth* v. *Seldin*, 422 U.S. at 501. The ESA citizen-suit provision, 16 U.S.C. 1540(g), upon which the court of appeals relied (Pet. App. 10a), likewise cannot overcome standing deficiencies under Article III. See *Middlesex County Sewerage Auth.* v. *National Sea Clammers Assoc.*, 453 U.S. 1, 16 (1981) ("citizen-suit provisions apply only to persons who can claim some sort of injury"); see also *Gwaltney of Smith-*

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[17] The need for circumspection in recognizing standing in this case is especially clear because respondents' claim of "injury" rests on alleged harm to wildlife within the territorial jurisdiction of foreign sovereigns. At least in the absence of the clearest expression of congressional intent, an asserted "injury" arising in such a wholly foreign context should not be a basis for invoking the jurisdiction of a United States court under United States law. Cf. *Mason* v. *United States*, 260 U.S. 545, 558 (1923); *Ellenwood* v. *Marietta Chair Co.*, 158 U.S. 105, 107 (1895).

field, Ltd. v. *Chesapeake Bay Foundation*, 484 U.S. 49, 65-66 (1987).[18]

B. The Court of Appeals Erred By Resting Standing On An Alleged "Procedural Injury"

The court of appeals tried to sidestep respondents' failure to prove the concrete injury-in-fact, causation, and redressability required by Article III by holding that respondents' standing could rest on a "procedural injury" that supposedly arises from the failure by action agencies to engage in Section 7 consultation about overseas projects. Pet. App. 10a-11a, 42a-44a. Even under this novel theory, respondents would lack standing, because they have not sued an action agency to compel it to consult with the Secretary; to the contrary, they have sued a defendant who is not authorized by the ESA to require other agencies to consult. In any event, there is no indication that the consultation provisions of Section 7 were intended to confer procedural rights on private groups such as respondents. Consultation takes place entirely between the relevant agencies, without any statutory provision for public input. See 16 U.S.C. 1536(b)

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[18] In any event, the citizen-suit provision, as relevant here, authorizes suits only against a person "who is alleged to be in violation" of the ESA. 16 U.S.C. 1540(g)(1)(A). Section 7(a)(2) imposes the duties to consult and refrain from jeopardizing listed species directly on the action agency. If it fails to consult, it is that agency, not the Secretary, that has "violated" the ESA. Nor is the Secretary "in violation" of the ESA because he allegedly has given an incorrect interpretation to one of its provisions, especially since the ESA did not require the Secretary to issue a regulation interpreting the geographic scope of Section 7(a)(2) in the first place. Although the citizen-suit section does permit suits against the Secretary in certain limited circumstances, this is not one of them. See 16 U.S.C. 1540(g)(1)(B) and (C) (suits to compel the Secretary to apply certain prohibitions on takings, and suits alleging a failure by the Secretary to perform any non-discretionary act or duty under Section 4, which pertains to the listing of species and designation of critical habitat). This suit therefore is one challenging "agency action" (the regulation) under the general judicial review provisions of the APA.

and (c); 51 Fed. Reg. at 19,928.[19] Section 7 therefore is unlike the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, which often serves a public-information purpose. See *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 349-350 (1989).

Moreover, even under a statute like NEPA, some concrete stake, distinct from a "procedural" claim, is essential for Article III standing, because procedural protections exist only to secure substantive interests and therefore may be invoked only by persons who suffer injury to those interests. Accordingly, the three circuits that have recognized "procedural injury" as a basis for standing in suits arising under NEPA have limited that theory to a litigant "having a sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project may have." *City of Los Angeles* v. *NHTSA*, 912 F.2d 478, 492-493 (D.C. Cir. 1990) (quoting *City of Davis* v. *Coleman*, 521 F.2d 661, 671 (9th Cir. 1975)); see also *Friends of the Earth* v. *U.S. Navy*, 841 F.2d 927, 931-932 (9th Cir. 1988); *City of Evanston* v. *Regional Transp. Auth.*, 825 F.2d 1121, 1126 (7th Cir. 1987), cert. denied, 484 U.S. 1005 (1988); *South East Lake View Neighbors* v. *Dep't of Housing & Urban Development*, 685 F.2d 1027, 1039 (7th Cir. 1982). The Eighth Circuit's rejection of the "geographical nexus" requirement in this case (see Pet. App. 10a-11a) therefore departs both from basic standing principles and established precedent.

Respondents' asserted right to have government agencies consult with one another is indistinguishable from the "asserted right to have the Government act in accordance

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[19] FWS and NMFS rejected requests to provide an opportunity for public comment in the initial regulations governing interagency consultation promulgated in 1978. They explained that a public comment requirement would be administratively burdensome, since they expected to receive between 10,000 and 20,000 consultation requests per year, and also that "Federal agencies may avoid the consultation process if they are given the impression that they are going to be subjected to protracted political battles under the guise of public comment and participation." 43 Fed. Reg. 872.

with law" found insufficient in *Allen* v. *Wright*, 468 U.S. at 754. The mere fact that respondents may have exhibited a long-standing organizational interest in the implementation of Section 7(a)(2) likewise is not enough to confer standing, contrary to the court of appeals' view, Pet. App. 10a, 43a. See *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). As this case vividly illustrates, the court of appeals' novel standing theories open the way for broad suits by organizations that have no concrete stake in the conduct of governmental programs, contrary to *Lujan* v. *National Wildlife Fed'n*, *supra*.

For the foregoing reasons, the Court should reverse the judgment below and remand with directions to enter judgment for the Secretary on standing grounds, because respondents did not raise a genuine issue of material fact to support their allegations of standing. Compare *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. at 3186-3187, 3188-3189.

II. THE 1986 REGULATION IS BASED ON A PROPER INTERPRETATION OF SECTION 7(a)(2) AS NOT APPLYING TO ACTIONS IN FOREIGN COUNTRIES

In addition to the abstract nature of respondents' challenge, the decision of the court below will, if it stands, have far-reaching consequences. An agency's duty to consult with the Secretary under Section 7(a)(2), on which the court of appeals focused, is ancillary to (and in aid of) the agency's substantive duty to insure that actions it authorizes, funds, or carries out are not likely to jeopardize the continued existence of endangered or threatened species. If the duty to consult applies to activities in foreign countries, then so does the duty to avoid jeopardy. The latter is one of the strictest standards under the Nation's environmental laws. See *TVA* v. *Hill*, 437 U.S. 153, 172-174 (1978).

Even the consultation obligation would impose significant burdens and anomalies in this setting.[20] The elab-

[20] The action agency first must obtain from FWS or NMFS information about whether a listed species may be present in the

orate procedures contemplated by the consultation process (see note 20, *supra*) are designed to ensure that all relevant information and alternative courses of action are fully scrutinized by and debated among agencies of the United States Government. They are premised on full access to relevant information; they reflect domestic environmental values and commitments to a deliberative process; and they are suited to evaluating and rendering decisions about governmental actions, species of animals and plants, and territory that are fully within the jurisdiction of the United States as sovereign.

By contrast, these structured deliberations—which are wholly internal to the United States Government and focus on whether a project would comply with a strict standard derived solely from United States law—are not tailored to making judgments about projects to be undertaken within a foreign country, where the territory, project, natural resources, and species affected are all within the primary jurisdiction of the foreign government and its laws. Not only would this procedure likely cause affront to the foreign government concerned, but the agencies of the United States Govern-

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action area: if so, and if the project is a "major construction activit[y]," the agency must prepare a "biological assessment" within 180 days. 16 U.S.C. 1536(c); 50 C.F.R. 402.12. If the assessment shows a likely adverse effect on a listed species, then formal consultation, resulting in a formal "biological opinion" by FWS or NMFS, must occur over a 90-day period. 16 U.S.C. 1536(b); 50 C.F.R. 402.12(k), 402.14(b) and (e). During that time, the agency must refrain from making an irreversible commitment of resources that would foreclose reasonable alternatives. 16 U.S.C. 1536(d); 50 C.F.R. 402.09. If FWS or NMFS finds that the action is likely to jeopardize the existence of a listed species, it must identify what "reasonable and prudent alternatives" (if any) the agency can take to avoid a violation of Section 7(a)(2). 16 U.S.C. 1536(b)(3)(A) and (4); 50 C.F.R. 402.14(g)(5) and (h). The agency then must decide "whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion." 50 C.F.R. 402.15(a). It may disagree with that opinion, adopt an alternative course to avoid jeopardy, or seek an exemption (which can itself be a time-consuming process, see 16 U.S.C. 1536(g); 50 C.F.R. Pts. 450-453).

ment involved in the consultation process might well lack access to all relevant information concerning conditions in the foreign country; what is more, the prescribed procedures would often be incompatible with the need for speed, flexibility, confidentiality and comity in the conduct of this Nation's foreign affairs. An Act of Congress should not lightly be construed to extend such rigid substantive standards and ill-suited procedures to activities abroad. Cf. *United States* v. *Verdugo-Urquidez*, 110 S. Ct. Ct. 1056, 1065-1066 (1990).

For reasons such as these, "[i]t is a long-standing principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991) (quoting *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949)); *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989). Congress is presumed to be "primarily concerned with domestic conditions," unless an "affirmative intention" to give the relevant statutory provision extraterritorial reach is "clearly expressed." *Arabian American Oil Co.*, 111 S. Ct. at 1230 (quoting *Foley Bros.*, 336 U.S. at 285, and *Benz* v. *Compania Naviera Hildalgo, S.A.*, 353 U.S. 138, 147 (1957)). This rule "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Arabian American Oil Co.*, 111 S. Ct. at 1230. The Court assumes that Congress acts against the backdrop of this presumption, *ibid.*, and the requirement in this "traditionally sensitive area[]" that there be a "clear statement"—*i.e.*, that "Congress must state precisely any intention" to give extraterritorial application to a statutory provision—"assures that the legislature has in fact faced" and is prepared to accept the potential consequences. See *Astoria Federal Savings & Loan Ass'n* v. *Solimino*, No. 89-1895 (June 10, 1991), slip op. 4.[21]

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[21] In *Arabian American Oil Co.*, the Court distinguished *Steele* v. *Bulova Watch Co.*, 344 U.S. 280 (1952), which sustained application

In this case, the court of appeals rejected the uniform and considered interpretation of Section 7(a)(2) by the Secretaries of the Interior and Commerce, who are responsible for its administration—and by the other departments and agencies in the Executive Branch that are responsible for national defense, foreign relations, and overseas aid—that Section 7(a)(2) does *not* apply to projects in foreign countries. But in doing so, the court of appeals did not point to any affirmative indication—much less a "clear statement"—that Congress specifically intended that Section to apply overseas. In fact, where Congress intended a particular section of the ESA to have extraterritorial application, it expressly so stated and provided for coordination with the foreign government concerned or the Secretary of State. By contrast, the text and legislative history of Section 7 establish that it has a "purely domestic focus." *Arabian American Oil Co.*, 111 S. Ct. at 1234.[22] At the very least, the admin-

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of the Lanham Act's prohibition against deceptive and misleading use of trademarks to acts consummated in Mexico; the Court noted that the conduct in *Steele* had "some effects within the United States" and that the Lanham Act had a "broad jurisdictional grant" and a "sweeping reach into 'all commerce which may lawfully be regulated by Congress.'" 111 S. Ct. at 1232 (quoting 344 U.S. at 285, 287). The antitrust and securities laws likewise apply to conduct outside the United States but having an effect within. See *W.S. Kirkpatrick & Co.*, 110 S. Ct. 701, 705-706 (1990); *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-705 (1962); *Consolidated Gold Fields PLC* v. *Minorco, S.A.*, 871 F.2d 252 (2d Cir. 1989); *Schoenbaum* v. *Firstbrook*, 405 F.2d 200, on reh'g on other grounds, 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied, 395 U.S. 906 (1969); see also *Restatement (Third) of Foreign Relations Law* § 416 (1986). Section 7(a)(2) of the ESA (like Title VII) is quite different, and there is no indication that Congress intended it to apply in foreign countries because of any effects within the United States.

[22] Other courts of appeals, in contrast to the court below, have relied on the presumption in ruling against extraterritorial application of the Nation's environmental statutes. See *NRDC* v. *NRC*,

istrative interpretation of Section 7(a)(2) to that effect is reasonable and therefore should have been sustained under *Chevron*.

A. The Text of the Endangered Species Act Establishes That Section 7(a)(2) Is Not To Be Construed To Apply To Activities in Foreign Countries

1. The text of Section 7, far from demonstrating a "clearly expressed" intention that it apply to overseas activities, is focused on domestic concerns. It requires federal agencies to "insure" that actions they authorize, fund, or carry out are "not likely to jeopardize the continued existence of any endangered species or threatened species, or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical." The court of appeals recognized (Pet. App. 12a-13a) that the mere use of such general phrases as "any action" in Section 7(a)(2) is insufficient to extend its coverage to actions in foreign countries, in light of the presumption against extraterritorial application.[23] See *Foley Bros.*, 336 U.S. at 282 (statute requir-

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647 F.2d 1345, 1356-1357 (D.C. Cir. 1981) (holding NEPA inapplicable to the export of a nuclear reactor to the Philippines); *United States* v. *Mitchell*, 553 F.2d 996, 1003-1004 (5th Cir. 1977) (holding the Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq.*, inapplicable within the territorial waters of the Bahamas); see also *Greenpeace USA* v. *Stone*, 748 F. Supp. 749, 758-759 (D. Haw. 1990) (rejecting NEPA challenge to the Secretary of Defense's implementation of an agreement with the Federal Republic of Germany to remove obsolete chemical weapons from Germany), appeal dismissed as moot, 924 F.2d 175 (9th Cir. 1991).

[23] The extraterritoriality question in this case hinges on the meaning of the phrase "any action" in Section 7(a)(2). The regulation at issue interprets that phrase to encompass only agency actions "in the United States or upon the high seas," but recognizes that the requirements of Section 7(a)(2) apply wherever such actions would affect "any listed species." 50 C.F.R. 402.01. Section 4 of the ESA specifically contemplates the listing of foreign as well as domestic species, in order to implement importation and foreign commerce restrictions under Section 9 and international cooperation under Section 8. Thus, the regulation indicates that Section 7(a)(2)

ing eight-hour day provision in "[e]very contract made to which the United States is a party" inapplicable to contracts for work performed in foreign country); see also *Arabian American Oil Co.*, 111 S. Ct. at 1231-1232 (broad definitions of "employer" and "commerce" insufficient to sustain extraterritorial application of Title VII).

Significantly, moreover, the only geographical reference in Section 7(a)(2) is to "affected States." The absence of any reference to foreign nations strongly indicates that Congress, as usual, was focusing on domestic activities. See *Arabian American Oil Co.*, 111 S. Ct. at 1234 (similarly noting Title VII's mention of "states" but not foreign nations).[24] In fact, the court of appeals did not question the longstanding position of the Secretaries of the Interior and Commerce that the portion of Section 7(a)(2) in which the reference to "affected States" appears does *not* contemplate designation of critical habitat in foreign countries. See pages 2-3, *supra*.

The court of appeals' response—that Congress intended extraterritorial application of Section 7(a)(2)'s protection for species but not its intimately related protection for their critical habitat (Pet. App. 18a)—is manifestly unsound. Even in the ordinary case it would be surprising to conclude that Congress intended, without say-

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might well apply if an action in the United States or on the high seas would be likely to jeopardize the continued existence of an endangered or threatened species in a foreign country. Nothing, however, suggests that Section 7(a)(2) was intended to apply where the action itself is in a foreign country.

[24] Moreover, the text of Section 7(a)(2) requires agencies to "insure" that actions they authorize, fund, or carry out will not have the specified impacts on listed species or their habitats. Federal agencies are in a position to "insure" that result within the territorial jurisdiction of the United States (where state and local governments and private parties whose actions are "authorized" or "funded" by federal agencies remain subject to federal law, and to the jurisdiction of the courts where necessary to enforce the law)—and perhaps even on the high seas. But the ability of an agency of the United States to "insure" compliance would be greatly circumscribed in a foreign country, in view of the foreign government's independent prerogatives.

ing so, to give vastly different geographic scope to two phrases in the same sentence of a statute. But it is hardly the ordinary case where a court gives *extra-territorial* effect to one phrase, while giving the usual domestic effect to the other. The court below should not have adopted such a bizarre construction without clear evidence that Congress actually considered the extraterritoriality issue in the context of Section 7(a)(2) and deliberately chose that solution. Not surprisingly, there is no such evidence here. Indeed, it would be particularly illogical to give divergent scopes to the duty to avoid jeopardy to listed species and the duty to avoid destruction or adverse modification of their critical habitat, since Congress recognized that the "most significant" threat to the continued existence of species was "the destruction of critical habitat." H.R. Rep. No. 412, 93d Cong., 1st Sess. 5 (1973); see also *TVA* v. *Hill*, 437 U.S. at 179 ("destruction of natural habitats" is greatest threat to endangered species).[25]

2. The domestic focus of Section 7 as a whole is confirmed by the exemption provisions in subsections 7(e)-(p), 16 U.S.C. 1536(e)-(p).[26] Exemptions may be

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[25] In addition, the reference to "States" in the second part of the relevant sentence of Section 7(a)(2) cannot readily be separated as a grammatical matter from the duty described in the first part to avoid jeopardy to "endangered or threatened species." The second part of the sentence requires agencies to insure that their actions are not likely to destroy or adversely modify the habitat of "such species" that has been determined by the Secretary, after consultation with "affected States," to be critical. The reference to "such species" obviously is to the endangered or threatened species mentioned in the first part of the sentence. There accordingly is a direct nexus between the second part of the sentence (including its reference to "States") and the duty to avoid jeopardy to listed species, which respondents seek to extend to foreign countries.

[26] The exemption provisions were added in 1978 in response to the strict application of Section 7 to a domestic dam project in *TVA* v. *Hill*, *supra* (H.R. Rep. No. 1625, 95th Cong., 2d Sess. 10-11, 13 (1978)), and they caused the Interior Department promptly to reconsider and then to change its initial view that Section 7 applies to projects in foreign countries.

granted by an Endangered Species Committee consisting of the heads of six federal agencies and "one individual from each affected State." 16 U.S.C. 1536(e)(3).[27] Similarly, the entities that may apply for an exemption are limited to the action agency, a permit or license applicant, and "the Governor of the State in which an agency action will occur, if any." 16 U.S.C. 1536(g)(1).[28] No role is provided for a representative of a foreign government, or for the Secretary of State, in the process of granting exemptions from Section 7(a)(2)'s rigid requirements. Compare § 7(i) (barring exemption where Secretary of State certifies it would violate treaty or other international obligation of the United States).

Moreover, to grant an exemption, the Committee must find that "the action is of regional or national significance," there are no "reasonable and prudent alternatives," the benefits "clearly outweigh the benefits of alternative courses of action," and the action "is in the public interest." 16 U.S.C. 1536(h)(1)(A). In devising these tests, Congress plainly had domestic projects in mind. Indeed, it would significantly intrude upon the sovereignty of foreign nations for the United

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[27] The House Report on the 1978 amendments noted that membership on the committee "has been deliberately structured * * * to balance all possible points of view." H.R. Rep. No. 1625, *supra*, at 15. If Congress had intended Section 7 to apply to activities within foreign nations, membership of the Secretary of State would be necessary to "balance all possible points of view."

[28] Contrary to the court of appeals' speculation (Pet. App. 19a), the reference to the affected State "if any" does not suggest that activities in foreign countries are covered. That phrase assumes coverage of activities on the Outer Continental Shelf, which lies outside the boundaries of the States (see 43 U.S.C. 1312; *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531, 547 (1987)), and on the high seas, in light of the responsibilities of the Secretary of Commerce for marine species. 16 U.S.C. 1532(15), 1536(e)(3)(F); 124 Cong. Rec. 21,563-21,564 (1978). Coverage of activities in those areas does not present the same degree of foreign-relations sensitivity that would arise from coverage of activities within the territories of foreign sovereigns. Cf. *Arabian American Oil Co.*, 111 S. Ct. at 1233.

States Government to presume to pass judgment—outside the diplomatic process, in a formal and public manner, and under standards and procedures prescribed by United States law—on whether their projects are in the "public interest" and whether alternative courses of action are "reasonable and prudent" and might be preferable.

3. The court of appeals ultimately relied on *other* sections of the ESA in holding that Section 7(a)(2) applies to activities in foreign countries. Pet. App. 13a-15a. But the provisions upon which the court relied in fact confirm that Congress distinguished between the endangered species situation in the United States and that in foreign countries, and dealt with the latter by the accepted means of encouraging cooperative efforts between nations, rather than imposing this Nation's environmental standards abroad.

The congressional findings in paragraphs (1)-(3) of ESA Section 2(a) focus on species of fish, wildlife and plants "in the United States" that have been rendered extinct or depleted "as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. 1531(a)(1)-(3). There is no similar finding with regard to the effect of development in foreign nations, presumably because they may have different views about the proper balance between economic growth and environmental protection. Paragraph (4) notes that the United States "has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction," pursuant to treaties and international agreements. 16 U.S.C. 1531(a)(4). Thus, in the international sphere, Congress contemplated that measures would be taken cooperatively among "sovereign state[s]," each having jurisdiction within its own territory, and that conservation accordingly would be accomplished only "to the extent practicable." 16 U.S.C. 1531(a)(4). Section 7(a)(2) is not tempered by such considerations of practicability and respect for national sovereignty.

Reflecting the approach envisaged by Section 2 of the ESA, Section 8, entitled "International cooperation," addresses conservation of species abroad by authorizing the President "to provide to any foreign country (with its consent) assistance in the development and management of programs * * * useful for the conservation of any endangered species or threatened species listed by the Secretary." 16 U.S.C. 1537(a). Section 8 further provides that the Secretary of the Interior, "through the Secretary of State," shall "encourage" foreign countries to conserve fish and wildlife and to enter into bilateral or multilateral agreements. 16 U.S.C. 1537(b).

Congress also dealt with the protection of foreign species in Section 9 of the ESA, which makes it unlawful, *inter alia*, to "deliver, receive, carry, transport, or ship in interstate or foreign commerce" any endangered species. 16 U.S.C. 1538(a)(1)(E) and (a)(2)(C). "Foreign commerce" is defined in Section 3 of the ESA to include, *inter alia*, any transaction "between persons within one foreign country." 16 U.S.C. 1532(9)(A). Thus, Section 9's prohibition on commerce in endangered species is explicitly extraterritorial. At the same time, it is carefully tailored to apply only to persons "subject to the jurisdiction of the United States," 16 U.S.C. 1538 (a)(1) and (2). The related prohibition on "takings" of endangered fish or wildlife is limited to the United States, its territorial sea and the high seas. 16 U.S.C. 1538(a)(1)(B) and (C). This carefully reticulated structure of Section 9 shows that Congress clearly specified when it wanted to reach acts committed beyond the boundaries of the United States, and carefully avoided any wholesale application of the Act's provisions to activities in foreign nations. In this context, the absence of any explicit statement in Section 7 extending its standards and procedures to actions in foreign countries confirms that Congress acted in accordance with the operative presumption and did not give that Section extraterritorial application. Compare *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. at 441.

Of course, because the Act has both domestic and international components, it was necessary to provide for the listing of both domestic and foreign species. But in doing so, Section 4, like Sections 8 and 9, is carefully tailored to accommodate the divergent interests and sensitivities of foreign nations by requiring the Secretary to take account of their efforts to protect species, 16 U.S.C. 1533(b)(1)(A), and to afford notice and an opportunity to comment to the foreign nation affected, 16 U.S.C. 1533(b)(5)(B).[29] Section 7, by contrast, does not mention foreign nations and contains no provisions to consider and accommodate their interests and views. This reinforces the conclusion, already evident from the references in Section 7(a)(2) itself to "affected States," that Congress did not intend *that* Section of the Act to apply overseas.

4. It is not surprising that Congress chose to address the problem of endangered species in other countries by means of international cooperation instead of mandatory application of Section 7's strict no-jeopardy standard. There has long been a consensus among nations that the development or protection of natural resources within each nation's boundaries is primarily the responsibility of that nation.[30] Accordingly, international conven-

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[29] In fact, even before Section 7 was enacted as part of the ESA of 1973, the Secretary of the Interior was required by Section 3(a) of the Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (repealed, 87 Stat. 903), to list species of fish or wildlife "threatened with worldwide extinction." That provision instructed the Secretary to make such a listing "after consultation, in cooperation with the Secretary of State, with the foreign country or countries in which such fish or wildlife are normally found." The 1969 Act generally prohibited importation of listed species (§ 2, 83 Stat. 275), but contained no provisions directed to federal agencies.

[30] Principle 21 of the Declaration of the United Nations Conference on the Human Environment, agreed upon in Stockholm in 1972, declares:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that

tions dealing with wildlife confirm the authority and responsibility of each state to protect its resident wildlife. The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), for instance, recognizes in its preamble "that peoples and States are and should be the best protectors of their own wild fauna and flora." 27 U.S.T. 1087, T.I.A.S. No. 8249.[31] See also Convention on the Conservation of Migratory Species of Wild Animals, 1979 (Bonn Convention), Preamble, 19 I.L.M. 15 (1980) ("the States are and must be the protectors of the migratory species of wild animals that live within or pass through their national jurisdictional boundaries"). Moreover, other nations have taken steps to assume responsibility for their natural resources and for implementing their own judgments regarding the appropriate balance between development and protection.[32]

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activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

U.N. Doc. A/Conf. 48/14, 11 I.L.M. 1416, 1420 (1972). The Stockholm Declaration also recognizes that "standards which are valid for the most advanced countries * * * may be inappropriate and of unwarranted social cost for the developing countries," and that "[c]o-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects * * * in such a way that due account is taken of the sovereignty and interests of all States." *Id.* at 1420-1421 (Principles 23 & 24). See also *Restatement (Third) of Foreign Relations Law* § 206(a) (1986) (a state has "sovereignty over its territory").

[31] In the international sphere, the primary purpose of the ESA was to implement the recently concluded CITES convention. See S. Rep. No. 307, 93d Cong., 1st Sess. 5-6 (1973); H.R. Rep. No. 412, 93d Cong., 1st Sess. 2-3 (1973). Significantly, CITES requires parties to enact and enforce prohibitions against wildlife trade in violation of the Convention (a requirement implemented by Section 9(c) of the ESA, 16 U.S.C. 1538(c)), but does not require them to limit governmental activities, either at home or abroad, that could result in jeopardy to endangered species. See Art. VIII.

[32] For example, in a May 1980 letter to AID about the Mahaweli Project, FWS observed that "[t]he Sri Lankan government realizes

For these reasons, many nations would find it offensive to have standards derived from American statutes applied to projects within their boundaries, and foreign government sensitivity in turn could impede initiatives to enhance environmental protection. Cf. *Japan Whaling Ass'n*, 478 U.S. at 222, 241. It would thus be surprising if Congress had chosen to apply the strict standard of Section 7(a)(2) to activities in foreign nations. The statutory text shows clearly that it did not.

B. The Legislative History of Section 7 Confirms its Domestic Orientation

References to Section 7 in the legislative history of the 1973 Act mention only domestic agency actions as being affected. See, *e.g.*, H.R. Rep. No. 412, *supra*, at 14 (Park Service actions in Yellowstone Park); 119 Cong. Rec. 42,913 (1973) (Air Force practice bombing in Texas); *id.* at 25,689-25,690 (Corps of Engineers road-building in Kentucky). By contrast, both the House and Senate Reports discuss the problem of endangered species abroad in terms of international cooperation under Section 8, without mentioning the requirements of Section 7. S. Rep. No. 307, 93d Cong., 1st Sess. 5-6 (1973) (citing need for international cooperation to fulfill treaty commitments); H.R. Rep. No. 412, 93d Cong., 1st Sess.

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the importance of the wildlife as part of their national heritage" and "has a good wildlife parks system and a functional Department of Wildlife Conservation"; its fauna and flora are "well-studied"; and "competent personnel" are present in the country. J.A. 215-216. There is, in fact, a long history of nations' taking protective measures with respect to wildlife and the environment within their jurisdictions. King Akhenaten set aside land as a nature reserve in 1370 B.C., and Emperor Ashoka of India issued a decree in the third century B.C. that protected various birds, bats, queen ants, terrapins, boneless fish, rhinoceroses and "all quadrupeds which are not useful or edible." S. Lyster, *International Wildlife Law* xxi (1985). More recently, many nations have enacted into law some form of environmental-analysis requirement. See *Analysis and Perspective: Environmental Impact Assessment in North America, Western Europe: What Has Worked Where, How, and Why*, 11 Int'l Env't Rep. (BNA) 257 (1988).

6 (1973) (Act deals with endangered species abroad by encouraging other countries' efforts to protect species and by closing American markets to trade in species). Senator Tunney, the floor manager, similarly stated (119 Cong. Rec. 25,670 (1973)):

> [W]hile we are concerned with our endangered domestic species, we must not forget the many animals that are in need of worldwide attention. S. 1983 includes the mechanisms of international cooperation that fulfill our commitments under international conventions for the protection of endangered species.[33]

The legislative history of the 1978 amendments is to the same effect. The Senate Report, for example, explained that the exemption procedure was "intended to provide a mechanism for the resolution of conflicts which might arise between the Endangered Species Act's mandate to protect and manage endangered and threatened species and other legitimate *national* goals and priorities such as providing energy, economic development and other benefits to the *American* people." S. Rep. No. 874, 95th Cong., 2d Sess. 2 (1978) (emphasis added); cf. *Benz*, 353 U.S. at 144, and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20 (1963) (both quoting legislative history of intent to protect "*American* workingmen"). The floor debates on the exemption procedure likewise discuss Section 7 only in connection with projects in the United States.[34]

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[33] See also 119 Cong. Rec. at 25,676 (Senator Williams) (foreign species addressed by encouraging other nations to adopt their own protection programs and through multilateral agreements); *id.* at 30,166 (Rep. Leggett) (Act will "encourage international collaboration"); *id.* at 30,163 (Rep. Dingell) (Act will "encourage * * * foreign governments to develop healthy stocks of animals").

[34] See, *e.g.*, 124 Cong. Rec. 38,124 (1978) (Rep. Bowen) ("there are a number of projects in the country right now which are frozen and are at a standstill" due to Section 7); *id.* at 38,128 (Rep. Beville) (Section 7 "could actually paralyze the construction of needed projects in every district in this country"); *id.* at 21,132 (Senator Culver) ("there are now many other projects in the Nation where consultative resolution may not be possible under the exist-

The court of appeals relied (Pet. App. 16a-17a) on a statement in the Conference Report that the Senate version of the amendments, "by retaining existing law, was preferable [to the House version] since regulations governing section 7 are now familiar to most Federal agencies and have received substantial judicial interpretation." H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978). From this, the court inferred a "tacit approval" by Congress of the provision in the 1978 regulations that interpreted Section 7 as applying to projects in foreign countries. See note 4, *supra*. However, the Conference Committee was not focusing on the extraterritoriality question at all; it was simply considering whether to retain an overall procedural framework that was familiar to federal agencies and had been incorporated into regulations. Nor does the Report give any indication that the Conference Committee was aware of the administrative interpretation. Compare *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 603 (1991); *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979); *TVA* v. *Hill*, 437 U.S. at 192. Thus, nothing in this excerpt from the Conference Report, or elsewhere in the legislative history, remotely expresses a clear intent to extend Section 7 overseas.

C. The Presumption Against Extraterritorial Application Applies to Statutes That Constrain Federal Agencies

The court of appeals discounted the presumption against extraterritorial application of statutes because the ESA "is directed at the actions of federal agencies, and not at the actions of sovereign nations." Pet. App. 20a. But as this Court recently held, the mere fact that United States law imposes limitations on conduct by the Government does not mean that the law follows the Government abroad. *Verdugo-Urquidez*, *supra*. Moreover, the presumption

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ing arrangement"); *id.* at 38,665 (Rep. Murphy) (amendments provide "[a] procedure under which any project in the country can be considered for an exemption").

against extraterritoriality was applied in a directly analogous situation in *Foley Bros.*, *supra*, where the Court declined to apply to a foreign-aid project in another country a statutory provision regulating contracts "to which the United States is a party." 336 U.S. at 285.

Furthermore, the policies underlying the presumption are clearly implicated by legislation, such as Section 7, that restricts the activities of federal agencies. Applying Section 7, for example, to bar an agency of the United States from assisting a development project undertaken by a foreign government because that project is deemed to jeopardize species in the foreign country could easily result in "unintended clashes between our laws and those of other nations which could result in international discord." *Arabian American Oil Co.*, 111 S. Ct. at 1230. As several courts of appeals have pointed out, conditioning assistance to a foreign nation on compliance with our own environmental standards "directs that nation's choices just about as effectively as a law whose explicit purpose is to compel foreign behavior," and would likely be seen by that nation as a "disguised way of substituting United States regulatory standards for the [foreign nation's] own." *NRDC* v. *NRC*, 647 F.2d at 1356-1357; accord *United States* v. *Mitchell*, 553 F.2d at 1002 (different countries strike different balances between development and preservation, and the "traditional method of resolving such differences * * * is through negotiation and agreement rather than through the imposition of one particular choice by a state imposing its law extraterritorially"); see also *Babcock & Wilcox*, 5 N.R.C. 1332, 1345 n.11 (1977). Moreover, there can be serious practical barriers to the ability of a United States agency even to gather the necessary information in a foreign country, as the Assistant Solicitor of Interior recognized in concluding that the requirement to designate critical habitat does not apply in foreign countries. See J.A. 179 (quoted at page 3, *supra*); see also J.A. 190; *Arabian American Oil Co.*, 111 S. Ct. at 1234 (noting that EEOC has no power to issue subpoenas for witnesses or documents outside the United States). For these reasons, the presumption

against extraterritorial application of statutes is fully applicable to environmental statutes such as ESA Section 7(a)(2).

A closely related concern is that conditioning the overseas activities of government agencies on compliance with domestic environmental standards raises a serious threat of interference with the conduct of this Nation's foreign policy. As the State Department pointed out in 1978, "the mechanics of complying with the [ESA] consultation procedure * * * would often be incompatible with the speed, confidentiality and flexibility which are prerequisites of effective diplomacy." J.A. 189. Congress is presumed not to legislate in a way that would risk interference with the Executive Branch's conduct of foreign affairs. *Weinberger* v. *Rossi*, 456 U.S. 25, 31-32 (1982); *McCulloch*, 372 U.S. at 19; *Benz*, 353 U.S. at 147; cf. *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. at 319-322.

Congress has been sensitive to possible conflicts with foreign policy when it has addressed international environmental issues. NEPA, for instance, directs agencies to "lend appropriate support" to international cooperative efforts to prevent a decline in the worldwide environment "where consistent with the foreign policy of the United States." 42 U.S.C. 4332(2)(F). Likewise, Section 8 of the ESA assures consistency with foreign policy by requiring consultation with the Secretary of State in the rendering of assistance to foreign governments. 16 U.S.C. 1537(b), (c) and (d). Section 7 of the ESA contains no similar provision to assure consistency with foreign policy.

At the same time, Congress *has* specifically—and distinctly—addressed the role of environmental policy in implementing the Nation's foreign aid program. Section 117 of the Foreign Assistance Act directs the President to require the responsible agencies to prepare an "environmental impact statement" for any project funded under that Act that significantly affects the environment of the "global commons outside the jurisdiction of any country" and to prepare a (presumably less comprehensive)

"environmental assessment" for any project significantly affecting the environment of any "foreign country," 22 U.S.C. 2151p(c). Of particular relevance here, Section 119 of the Foreign Assistance Act specifically addresses the subject of endangered species by authorizing the furnishing of financial aid to help other nations protect wildlife habitats, develop sanctuaries, and catalog species, 22 U.S.C. 2151q(b), and it directs the Administrator of AID to take various actions to protect endangered species and promote biological diversity, 22 U.S.C. 2151q(g). The Administrator of Aid, in turn, has adopted regulations to ensure that environmental concerns are taken into account (see 22 C.F.R. Pt. 216), and an environmental assessment of the Mahaweli Project was undertaken pursuant to these statutory and regulatory provisions. See page 22 and note 12, *supra*. Thus, Congress has demonstrated that when it desires to do so, it knows how to provide for application of United States law in environmental matters arising in foreign countries.

More recently, in 1988, Congress passed a joint resolution in which it: (1) recognized that habitat destruction is a main cause of the accelerating extinction of animal and plant species and that "increased international cooperation is essential to protect species threatened with extinction," (2) called upon the President "to continue exerting United States leadership in order to achieve the earliest possible negotiation of an international convention to conserve the Earth's biological diversity," and (3) supported AID's efforts to initiate discussions to that end. Pub. L. No. 100-530, 102 Stat. 2651. Congress thus has confirmed that the appropriate approach to the preservation of endangered and threatened species and their habitats in foreign countries is through diplomacy and international cooperation and agreements. Unilateral extension of the strict substantive and procedural provisions of Section 7 of the ESA to U.S.-assisted actions in foreign countries would undermine the flexibility of the President and AID in these efforts. It also could severely disadvantage the United States in the international community by requiring it to abstain from participation in

important projects where the strict requirements of Section 7 cannot be fully satisfied, and it might, as a consequence, lead to less environmental protection because of the loss of the leverage the United States enjoys through such participation.

D. The Administrative Interpretation of Section 7 Is Entitled to Substantial Deference

Finally, the court of appeals plainly erred under *Chevron* by giving "no deference" (Pet. App. 15a) to what is, at the very least, a reasonable administrative interpretation of Section 7(a)(2). Even where, as here, an agency has changed its mind, "substantial deference is nonetheless appropriate if there appears to have been good reason for the change." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. at 355-356. Here, as in *Robertson*, the revision of the regulation came about "only after the prior regulation had been subjected to considerable criticism." 490 U.S. at 356; see also *Rust* v. *Sullivan*, 111 S. Ct. 1759, 1769 (1991). For one thing, the initial position conflicted with the administrative interpretation of the closely related critical-habitat provision in the same sentence of Section 7(a)(2), which does *not* apply in foreign countries. Moreover, the preamble to the 1986 regulation explained that the 1978 amendments to the ESA highlighted the "domestic orientation of the consultation and exemption processes," 51 Fed. Reg. 19,929, and the comments of the Executive Departments having responsibility for the conduct of foreign affairs made manifest the potential for interference with the sovereignty of foreign nations that would result from extraterritorial application. See pages 4-5, *supra*. There was, in short, "good reason for the change." *Robertson*, 490 U.S. at 356.

The view of the Executive Departments responsible for conducting the activities of the United States Government abroad is itself entitled to deference on questions of extraterritoriality. See *Babcock & Wilcox*, 5 N.R.C. at 1344; cf. *McCulloch*, 372 U.S. at 20. The consistent view of those Departments on the question presented here has

now been adopted as well by the Secretaries of the Interior and Commerce. The court of appeals has cast that broad consensus aside and sought to force every department and agency of the Executive Branch to acquiesce in its far different vision of Section 7(a)(2)'s geographic reach. Accordingly, if the Court concludes that respondents have standing to challenge the administrative interpretation in the abstract setting of this case (contrary to our submission in Point I), it should reverse the judgment below on the merits.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded with directions to enter judgment for the Secretary of the Interior on the ground that respondents lack standing to challenge the interpretative regulation. If the Court finds that respondents have standing, the judgment of the court of appeals should be reversed on the merits and the Secretary's interpretative regulation regarding the geographic scope of Section 7(a)(2) of the Endangered Species Act should be sustained.

Respectfully submitted.

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APPENDIX

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 2 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531, provides:

Congressional findings and declaration of purposes and policy

(a) Findings

The Congress finds and declares that—

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to—

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy

(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with

State and local agencies to resolve water resource issues in concert with conservation of endangered species.

2. Section 4 of the ESA, 16 U.S.C. 1533, provides in relevant part:

Determination of endangered species and threatened species

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

* * * * *

(b) Basis for determinations

(1)(A) The Secretary shall make determinations required by subsection (a)(1) of this section solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat

and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

(B) In carrying out this section, the Secretary shall give consideration to species which have been—

(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

* * * * *

(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3) of this section, the Secretary shall—

(A) not less than 90 days before the effective date of the regulation—

(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and

(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county, or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;

(B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose

citizens harvest the species on the high seas, and invite the comment of such nation thereon;

* * * * *

3. Section 7 of the ESA, 16 U.S.C. 1536, provides in relevant part:

Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

* * * * *

(e) Endangered Species Committee

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) of this section shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

* * * * *

(g) Application for exemption; report to Committee

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such

agency if, after consultation under subsection (a)(2) of this section, the Secretary's opinion under subsection (b) of this section indicates that the agency action would violate subsection (a)(2) of this section. An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) of this section after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

* * * * *

(2)(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

* * * * *

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5) of this section. The Committee shall grant an exemption from the requirements of subsection (a)(2) of this section for any agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing

held under subsection (g)(4) of this section and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of Title 5.

* * * * *

4. Section 8 of the ESA, 16 U.S.C. 1537, provides:

International cooperation

(a) Financial assistance

As a demonstration of the commitment of the United States to the worldwide protection of endan-

gered species and threatened species, the President may, subject to the provisions of section 1306 of Title 31, use foreign currencies accruing to the United States Government under the Agricultural Trade Development and Assistance Act of 1954 [7 U.S.C.A. § 1691 et seq.] or any other law to provide to any foreign country (with its consent) assistance in the development and management of programs in that country which the Secretary determines to be necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to section 1533 of this title. The President shall provide assistance (which includes, but is not limited to, the acquisition, by lease or otherwise, of lands, waters, or interests therein) to foreign countries under this section under such terms and conditions as he deems appropriate. Whenever foreign currencies are available for the provision of assistance under this section, such currencies shall be used in preference to funds appropriated under the authority of section 1542 of this title.

(b) Encouragement of foreign programs

In order to carry out further the provisions of this chapter, the Secretary, through the Secretary of State, shall encourage—

(1) foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to section 1533 of this title;

(2) the entering into of bilateral or multilateral agreements with foreign countries to provide for such conservation; and

(3) foreign persons who directly or indirectly take fish or wildlife or plants in foreign countries or on the high seas for importation into the United States for commercial or other pur-

poses to develop and carry out with such assistance as he may provide, conservation practices designed to enhance such fish or wildlife or plants and their habitat.

(c) Personnel

After consultation with the Secretary of State, the Secretary may—

(1) assign or otherwise make available any officer or employee of his department for the purpose of cooperating with foreign countries and international organizations in developing personnel resources and programs which promote the conservation of fish or wildlife or plants; and

(2) conduct or provide financial assistance for the educational training of foreign personnel, in this country or abroad, in fish, wildlife, or plant management, research and law enforcement and to render professional assistance abroad in such matters.

(d) Investigations

After consultation with the Secretary of State and the Secretary of the Treasury, as appropriate, the Secretary may conduct or cause to be conducted such law enforcement investigations and research abroad as he deems necessary to carry out the purposes of this chapter.

5. Section 9 of the ESA, 16 U.S.C. 1538, provides in relevant part:

Prohibited acts

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section

1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

* * * * *

6. Section 11 of the ESA, 16 U.S.C. 1540, provides in relevant part:

* * * * *

(g) Citizen suits

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of

any provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

* * * * *

7. 50 C.F.R. 402.01 provides in relevant part:

Scope.

(a) This part interprets and implements sections 7(a)-(d) [16 U.S.C. 1536(a)-(d)] of the Endangered Species Act of 1973, as amended ("Act").

* * * * *

Section 7(a)(2) of the Act requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action it authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species

or results in the destruction or adverse modification of critical habitat.

8. 50 C.F.R. 402.02 provides in relevant part:

Definitions.

* * * * *

"*Action*" means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.

* * * * *

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No. 90-1424

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,
Petitioner,

v.

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, and THE HUMANE SOCIETY OF THE UNITED STATES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the findings of fact of the district court, independently reviewed by the United States Court of Appeals for the Eighth Circuit, that respondents have proven their standing to bring this action were clearly erroneous.

2. Whether the United States Court of Appeals for the Eighth Circuit correctly held that the Secretary's 1986 regulation barring interagency consultation on U.S. agency actions that may affect endangered or threatened species abroad violates the plain language of the Endangered Species Act.

PARTIES

The petitioner is the Secretary of the Interior, Manuel Lujan, Jr.

The respondents are Defenders of Wildlife, Friends of Animals and Their Environment, and The Humane Society of the United States.

The respondents have no parent corporations or subsidiaries within the meaning of Supreme Court Rule 29.1.

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IN THE

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OCTOBER TERM, 1991

No. 90-1424

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v.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE RESPONDENTS

STATEMENT

This civil action presents two issues. The first is a straightforward application of this Court's standing precedent to a well-developed factual record. The issue on the merits is whether the Secretary's 1986 final rule which, in a sharp reversal of prior regulations, makes endangered species consultations unavailable to U.S. agencies when those agencies take action which may affect listed species abroad, violates the Endangered Species

Act. That Act requires the Secretary to engage in consultation with *each* federal agency on *any* action which may affect *any* species, wherever found. He refuses to do so.

This case raises no material foreign affairs concerns. Nothing indicates that the Endangered Species Act consultation process, in conjunction with the many other study processes federal agencies undertake, places any unacceptable burdens on U.S. agency planning. The administrative record in this action contains not a single comment from a foreign government indicating any concern about the effect of applying the Act to U.S. agency actions abroad.

This Court has long given the broad language of the Endangered Species Act its full play. In *TVA v. Hill*, 437 U.S. 153, 184 (1978), the Court identified the congressional purpose in passing the Act:

> The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. *This is reflected not only in the stated policies of the Act, but in literally every section of the statute.*

(Emphasis added.)

This case, like *TVA v. Hill*, involves the commands of Section 7 of the statute, 16 U.S.C. § 1536. There is nothing mysterious or unclear about the scope and impact of that section. As this Court recognized in *TVA v. Hill*:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to *insure* that actions *authorized*, *funded*, or *carried out* by them do not *jeopardize* the continued existence" of an endangered species or "*result* in the destruction or modification of habitat of such species. . . ." 16

> U.S.C. § 1536 (1976 ed) (Emphasis added). This language admits of no exception.

437 U.S. at 173 (emphasis in the original).

Both on standing and on the merits, the decision of the Eighth Circuit in this case was correct and fully consistent with the decisions of this Court. This Court should affirm the judgment of the court of appeals.

1. The Act Itself

> "[T]he Act, viewed as a whole, clearly demonstrates congressional commitment to worldwide conservation efforts."
>
> *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 123 (8th Cir. 1990) (*"Defenders II"*).

Section 2—The opening section of the Act evinces Congress' intent to protect endangered species worldwide. The Act states that the United States has pledged itself in at least six international treaties to conserve endangered species, and it identifies one of the primary purposes of the Act to be the means to achieve the goals of those treaties and conventions. 16 U.S.C. § 1531(a)(4) and (b). The Act commands "all federal departments and agencies" to use their authorities in furtherance of its purposes, including the international purposes just recited. 16 U.S.C. §§ 1531(c) and 1536(a)(1).

By stating that a purpose of the Act was to implement international conventions dealing with endangered species, there can be no doubt that Congress intended that the Endangered Species Act would affect U.S. actions abroad. The treaties that the Endangered Species Act implements recognize the international scope of the problem of preserving endangered species.

By way of example, in the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), March 3, 1973, 27 U.S.T. 1087, 1090,

T.I.A.S. No. 8249, 993 U.N.T.S. 243, *amended by* T.I.A.S. No. 11079, the United States agreed that, "wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and generations to come," and recognized, "the ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view." The United States has undertaken to protect endangered species listed in Appendix I, II and III to CITES. The Senate Report on the Endangered Species Act declared a purpose of the Act to be, "provision for the administrative implementation of the international convention on endangered species." S. Rep. No. 307, 93rd Cong., 1st Sess. 1 (1973). This Court has traditionally shown great deference to statutes implementing treaties. *Missouri v. Holland*, 252 U.S. 416 (1920).

Section 4—Under Section 4 of the Act, 16 U.S.C. § 1533,

> The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species . . . .

16 U.S.C. § 1533(a)(1). Under Section 4(b):

> (1)(A) The Secretary [of the Interior] shall make determinations . . . solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or *foreign nation*, . . . to protect such species . . . .
>
> (B) In carrying out this section, the Secretary shall give consideration to species which have been—
>
> > (i) designated as requiring protection from unrestricted commerce by any *foreign nation*, or pursuant to any *international agreement;* or

> (ii) identified as in danger of extinction . . . by any State agency or by any agency of a *foreign nation* that is responsible for . . . conservation . . . .

16 U.S.C. § 1533(b) (emphasis added). The Secretary's regulations with regard to listing, and the lists of endangered species themselves, are found at 50 C.F.R. Part 17.

Under Section 4 and the Secretary's published regulations, both domestic species and foreign species are listed. The Secretary does not contest that as of May 1989, of 1,046 species listed by him as endangered or threatened, 507 were species whose range is outside the United States. *Defenders II*, 911 F.2d at 123. The Secretary has never in this litigation disputed that the Act requires him to list both domestic and foreign endangered species, and he continues to do so. *See, e.g.*, J.A. at 245-46, 251.

Section 7—Section 7 of the Endangered Species Act implements practically Congress' intent that all federal agencies "shall seek to conserve endangered species and threatened species." 16 U.S.C. § 1531(c)(1). Under Section 7(a)(2), 16 U.S.C. § 1536(a)(2),

> *Each* Federal agency shall, in consultation with and with the assistance of the Secretary, insure that *any* action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of *any* endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species . . . .

(Emphasis added.) After consultation with an affected agency, the Secretary must issue a biological opinion on the effect of the proposed federal agency action on listed species, and propose an acceptable alternative action if the intended action is found to jeopardize listed species. 16 U.S.C. § 1536(b)(3).

The "May Affect" Standard—The requirement for Section 7 consultation is triggered when a federal action

may affect any listed species. In other words, Section 7 consultation occurs based upon a possibility of harm, or an increased risk of harm, to endangered species from federal action. There is no requirement that actual harm to listed species be shown prior to initiation of the Section 7 process. The Secretary has long agreed with this interpretation of the statute. *See, e.g.*, 50 C.F.R. § 402.14(a) ("Each federal agency shall review its actions at the earliest possible time to determine whether any action *may affect* listed species or critical habitat. If such a determination is made, formal consultation is required. . . .") (emphasis added); 51 Fed. Reg. at 19949 (1986) (explaining "may affect" standard).

The Role Of The Secretary—The Secretary is in charge of implementing the Endangered Species Act. In his answer to the amended complaint in this action, the Secretary admits, "that he is primarily responsible for implementation of the Endangered Species Act (ESA) with regard to those species under the jurisdiction of the Department of Interior." J.A. at 245.[1] *See also* 51 Fed. Reg. at 19928 (1986). The Secretary also admits, "the Fish and Wildlife Service (FWS) was designated the lead agency for the formulation of regulations concerning section 7 of the ESA." J.A. at 246.

Section 4 requires the Secretary to list foreign endangered species, and Section 7 requires the Secretary to consult on actions which may affect *any* listed species. Nothing in the language of Section 7, nor any other part of the Act, restricts the scope of his consultation duty only to federal agency actions that threaten wildlife within the United States.

Sections 9 and 11—Like Sections 4 and 7, Section 9, 16 U.S.C. § 1538, and Section 11, 16 U.S.C. § 1540, explicitly govern conduct which harms listed species abroad.

---

[1] The Secretary of Commerce is responsible for implementing the Act with regard to certain ocean dwelling listed species.

Section 9 prohibits the import and export of endangered species, and bars sales of such animals "in interstate or foreign commerce." 16 U.S.C. § 1538(a)(1)(A) and (F). Section 11 provides for forfeiture of listed species illegally "exported or imported" and provides for condemnation of vessels carrying such poached animals. 16 U.S.C. § 1540(e)(4) and (5).

The Citizen Suit Provision—Section 11 also contains the jurisdictional basis under which the district court and the court of appeals decided this case, the Act's citizen suit provision. That provision provides in part:

> [A]ny person may commence a civil suit on his own behalf—
>
> > (A) to enjoin any person, including the United States . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or . . .
> >
> > (C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section [4] . . . which is not discretionary with the Secretary.
>
> The district courts shall have jurisdiction . . . to enforce any such provision or regulation, or to order the Secretary to perform such act or duty . . . .

16 U.S.C. § 1540(g)(1). The statutory definition of "person" includes corporations and associations such as the respondents. 16 U.S.C. § 1532(3).

In this case, the acts of the Secretary plainly violate a provision of the Act within the meaning of 16 U.S.C. § 1540(g)(1)(A)—the Secretary has violated Section 7 of the Act by publishing a final rule refusing to provide the required consultation on *any* federal action which may affect *any* listed species. The promulgation of that final rule is itself a defined agency action under Section 7, subject to prompt judicial review under the citizen suit provision. 50 C.F.R. § 402.02, App. of Sec'y at 13a. The

Secretary's rule has reduced the level of protection provided to endangered species overseas. In his answer, the Secretary admits that, "the effect of [the rule] changes was to deny to species listed by the Fish and Wildlife Service pursuant to Section 4 of the Act whose primary range is outside the United States the protection those species had received both under the 1978 rule and the Act." J.A. at 248-49.

The Secretary's final rule is also susceptible to judicial review under 16 U.S.C. § 1540(g)(1)(C). Under Section 4(d) of the Act, 16 U.S.C. § 1533(d), the Secretary is required to issue regulations necessary and advisable to provide for the conservation of species listed under Section 4(c). By refusing to provide Section 7 consultations on projects affecting endangered species abroad, the Secretary is failing to provide for the conservation of listed species. The Secretary has in effect largely delisted those species. He has taken from them the protections they are guaranteed under the Act.

2. The History Of The 1978 Rule And The 1986 Rule

Shortly after passage of the Act in 1973 the Department of the Interior and other federal agencies began a series of discussions designed to outline the requirements Section 7 imposed on federal agencies and departments. *See* J.A. at 22-25, and 43 Fed. Reg. 870 (1978). On April 22, 1976, the Secretary issued "Guidelines to Assist Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973." *See* J.A. at 26. After revision, the Secretary issued a Notice of Proposed Rulemaking on January 26, 1977. 42 Fed. Reg. 4868 (1977). Both the Guidelines and the proposed rule explicitly stated that the consultation provisions of Section 7 applied to agency actions that may affect listed species in other countries. Proposed 50 C.F.R. § 17.91, 42 Fed. Reg. at 4871 (1977). The Federal Register notice on the proposed rule described in detail the interagency debate which had occurred on applying Section 7 to agency ac-

tions affecting listed species overseas. 42 Fed. Reg. at 4869.

The proposed rule received extensive comment and led to final rulemaking on January 4, 1978. 43 Fed. Reg. 870 (1978), codified at 50 C.F.R. Part 402 (the "1978 rule"). The final rulemaking retained the provision of the proposed rule applying Section 7 requirements to federal agency actions that may affect listed species in foreign countries. 50 C.F.R. § 402.02, 43 Fed. Reg. at 874 (1978).

Congress amended the Act in 1978. Pub. L. No. 95-632, § 3, 92 Stat. 3751 (1978). Congress enacted the new Section 7(a) (the current form of the consultation requirement) with the specific intention of restating existing law on Section 7 consultation requirements, including the regulations comprising the 1978 rule. *See* H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978). Congress thereby affirmed the correctness of the interpretation given to Section 7 in the 1978 rule.

"Despite this evidence of congressional intent, in 1983, the Secretary issued a notice of proposed rulemaking to revise the [1978 rule]." *Defenders II*, 911 F.2d at 124. *See* 48 Fed. Reg. 29990 (1983). The new proposed rule cut back the scope of Section 7 consultation requirements to actions proposed for the United States, its territorial waters, and the outer continental shelf. *Cf.* 51 Fed. Reg. at 19929 (1986) (explaining genesis of rule); J.A. at 46.

Over comments opposing his action, on June 3, 1986, the Secretary published a final rule revising the 1978 rule. 50 C.F.R. Part 402, 51 Fed. Reg. 19926 (1986) (the "1986 rule"). In response to the comments on the proposed rule, the Secretary retained that portion of the 1978 rule applying Section 7 to federal agency actions affecting species located on the high seas. The 1986 rule rescinded that portion of the 1978 rule which applied the

consultation requirements of Section 7 to federal agency actions that may affect species in foreign nations. The definition of "action" ("Federal agency action") in the 1986 rule purported to limit the applicability of Section 7's consultation requirement *only* to agency actions occurring in the United States or on the high seas. 50 C.F.R. § 402.02. No legislative history or dictionary definition was cited to support this odd definitional tack. This final rule by the Secretary represented a 180 degree turnabout from prior final agency policy. In his answer, the Secretary admits that the 1986 rule "is a final agency action." J.A. at 251.

The 1986 rule is a legislative rule, binding on the Secretary and the action agencies. The Secretary's unctuous contentions in his brief that his binding rule is some mere intepretive guideline are belied by the record, and intentionally obfuscate the legal effect of his actions.

The leading treatise on administrative law identifies the difference between legislative (binding) rules and interpretive rules as follows:

> [R]ules have force of law when issued pursuant to a grant of legislative power to make law through rules. The conclusion, very solidly based, is that rules are legislative when the agency is exercising delegated power to make law through rules, and rules are interpretative when the agency is not exercising such delegated power in issuing them.

2 K. Davis, *Administrative Law Treatise* § 7:10 at 54 (2d ed. 1979) (citing, *inter alia*, *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

The Secretary promulgated the 1986 rule under the authority granted him in the Endangered Species Act, and intended to exercise that authority to the fullest in his rulemaking. 50 C.F.R. Part 402 identifies the authority for the 1986 rule to be the Act as a whole, "16 U.S.C. § 1531 *et seq.*" In response to comments contending that,

"the proposal goes beyond the scope of the Act," the Secretary replied that, "The Service is satisfied that the final rule is within the scope of the authority provided in the Act." 51 Fed. Reg. at 19928 (1986). To make clear that he was exercising delegated legislative authority in the 1986 rule, and that the 1986 rule was mandatory to all agencies, the Secretary went on to state:

> Moreover, *the Service is responsible for interpreting section 7 and for establishing a consultation process that is both uniform and consistent with statutory requirements.* This issue was addressed in the preamble to the 1978 rule:
>
> > The FWS and NMFS are authorized under the Act to issue such regulations as they deem appropriate for the conservation of listed species. *The two Services believe that these procedural regulations promote the conservation of listed species* . . . .
>
> Several commenters stated that Congress did not intend that the Service interpret or implement section 7, and believed that the Service should recast the regulations as "nonbinding guidelines" that would govern only the Service's role in consultation. *The Service notes that Congress reviewed with approval the section 7 regulations issued on January 4, 1978,* when deliberating over the 1978 Amendments to the Act. *See* H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978). Also, the Service was urged by the House Committee, through its comments on the proposed rule, to press forward with the issuance of this final rule. *The Service is satisfied that it has ample authority and legislative mandate to issue this rule,* and believes that uniform consultation standards and procedures are necessary to meet its obligations under section 7. . . .

> *When this rule becomes effective, all pending and future consultations must comply with the requirements of these regulations. . . .*

51 Fed. Reg. at 19928 (1986) (emphasis added).

The 1986 rule is mandatory. The Secretary and the action agencies "must comply" with the rule. When the 1986 rule states that actions by federal agencies outside the United States and the high seas require no consultation, that means no consultation will occur, despite the contrary plain statutory language of Section 7.

3. Congressional Reaction To The Secretary's 1986 Rule

Congress has chided the Secretary about the 1986 rule. In the report of the House Committee on Appropriations accompanying the 1987 appropriations bill for the Department of the Interior, the following funding recommendation is made:

> The Committee also expects the [U.S. Fish and Wildlife] Service to continue to provide consultation on endangered species to United States agencies dispensing foreign assistance.

H.R. Rep. No. 714, 99th Cong., 2d Sess. 19 (1986). *See also* H.R. Rep. No. 171, 100th Cong., 1st Sess. 15 (1987); H.R. Rep. No. 713, 100th Cong., 2d Sess. 15 (1988). In the Senate, the Committee on Environment and Public Works, in reporting out the Endangered Species Act Amendments of 1987 (S. 675), stated:

> To the extent that [the 1986] regulations attempt to restrict the Act's requirements that each federal agency consult with the Secretary to ensure that its actions are not likely to jeopardize the continued existence and recovery of any listed species, the regulations have no statutory basis, are contrary to congressional intent, and are contrary to the law.

S. Rep. No. 240, 100th Cong., 1st Sess. 6-7 (1988). *See also* 134 Cong. Rec. S9758 (daily ed. July 25, 1988)

(statement of Sen. Chafee, floor manager of S. 675). Congress does not share the Secretary's apprehension about application of the Endangered Species Act to federal agency actions that may affect listed species abroad.

4. The Litigation

Respondents (collectively "Defenders") filed a complaint for declaratory and injunctive relief on August 27, 1986, alleging, *inter alia*, that the 1986 rule violated the Endangered Species Act. The jurisdictional basis for the Endangered Species Act claims was the citizen suit provision of Section 11 of that Act, 16 U.S.C. § 1540(g). First Amended Complaint at ¶ 1.

On February 25, 1987, the United States District Court for the District of Minnesota ordered the action dismissed, finding that Defenders lacked standing. *Defenders of Wildlife v. Hodel*, 658 F. Supp. 43 (D. Minn. 1987). In an opinion and order dated July 8, 1988, the United States Court of Appeals for the Eighth Circuit held that Defenders did have standing—that it had alleged substantive and procedural injuries fairly traceable to the Secretary's 1986 rule and redressable by the relief sought. *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir. 1988) ("*Defenders I*"). The substantive injury was the increased risk of harm to endangered species absent consultation; the procedural injury was the Secretary's refusal to carry out the mandatory Section 7 consultations. The Secretary petitioned the Eighth Circuit for rehearing *en banc*, a petition denied on October 14, 1988.

On remand, Defenders moved for summary judgment on the merits of its claims. The Secretary deposed several members of Defenders and himself moved for summary judgment, though again on the issue of standing. Under Fed. R. Civ. P. 56(e), the Secretary had an obligation to submit contrary testimony or other evidence to overcome the affidavit and deposition testimony offered by

Defenders' members, if he wished to challenge the veracity of Defenders' testimony and create a genuine issue of material fact. He did not do so, and Defenders' testimony stands as given.

After review of the beefed-up factual record, the district court granted Defenders' motion for summary judgment on its Endangered Species Act claims in an opinion and order dated February 15, 1989, and denied the Secretary's motion. *Defenders of Wildlife v. Hodel*, 707 F. Supp. 1082 (D. Minn. 1989). The district court ordered the Secretary to revoke and rescind the 1986 regulation, and to publish regulations, "affirmatively requiring that each federal agency consult with the defendant Secretary with respect to any agency action that may affect any endangered or threatened species, wherever found." 707 F. Supp. at 1086.

The Eighth Circuit affirmed the order of the district court in all respects. *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990). On standing, the Eighth Circuit conducted its own review of the fact-laden record before it, and concluded that Defenders had proven standing under all applicable precedents of this Court, including *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 111 L.Ed.2d 695 (1990). On the merits, the Eighth Circuit concluded based upon the plain language of the statute that the Secretary's Section 7 consultation duty extended to agency actions that may affect listed species abroad. The Secretary's petition for rehearing *en banc* was denied on December 10, 1990.

SUMMARY OF ARGUMENT

On standing, the record before the Court contains testimony of Defenders' members both by affidavit and by subsequent deposition that they have visited sites of federally funded development projects overseas for the purpose of viewing and studying endangered species. Those projects have not been, and under the Secretary's 1986 rule never will be, subject to Section 7 consultations. Defenders' members have testified that they will be harmed by the increased risk of extinction to these species absent consultation. Congress created the consultation process specifically to remedy this harm.

On the merits, the statute is clear on its face. This Court has already declared that, "One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act." *TVA v. Hill*, 437 U.S. at 173. Taking the plain meaning of Sections 4 and 7 in context with the international concerns of the Act, the Eighth Circuit correctly concluded that the language of the statute shows Congress' intent to apply Section 7 to agency actions affecting protected species abroad.

ARGUMENT

I. DEFENDERS HAS STANDING

This case involves a routine challenge to the most classic agency "action" there is—a duly promulgated final rule.[2] Environmental group plaintiffs have sued on behalf of members who have visited project sites for the purpose of studying endangered species. Because of the Secretary's final 1986 rule, those projects have not been, and will not be, subjected to consultation under Section 7 of the Endangered Species Act. This lack of consultation places endangered species at an increased risk of extinction and harms Defenders' interests and the interests of Defenders' members. Ever since *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972), such facts have sufficed to support standing.

A. Congress Intended That Defenders Have Standing To Enforce The Endangered Species Act

Article III of the Constitution requires that to possess standing a plaintiff show an injury in fact, "fairly" traceable to the complained-of action, "likely" to be redressed by the relief sought. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). "Injury," however, is not a fixed legal term. This Court has recognized that, "'[t]he actual or threatened injury required by Art. III may exist solely by virtue of "statutes creating legal rights, the invasion of which creates

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[2] *See* 50 C.F.R. § 402.02 (defining as "action" within the meaning of Section 7 promulgation of regulations). Judicial review of final agency rules is presumed to be available and will not be refused absent clear evidence that such was the intent of Congress in the authorizing legislation. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). This Court regularly decides facial legal challenges to newly promulgated final rules, prior to any specific enforcement activity. *See, e.g., Rust v. Sullivan*, 111 S. Ct. 1759, 114 L. Ed. 2d 233, 247 (1991) (action "challenging the facial validity of [abortion counseling] regulations and seeking declaratory and injunctive relief to prevent implementation of the regulations").

standing . . . .'" *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (citations omitted) (statutory right to be free from racially motivated false statements about availability of housing). *See also* Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 253 (1988) ("[W]hen the Court has decided actual cases involving statutory rights, it has never required any showing of injury beyond that set out in the statute itself."); Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 Wis. L. Rev. 37, 61-70 (in context of statutory rights and duties, separation of powers concerns counsel judicial deference to Congress' ability to define injury).

In the Endangered Species Act Congress defined a series of new legal duties, including the Section 7 consultation duty of "each" federal agency. Congress also defined broadly in the citizen suit provision the class of persons which has a legal right to enforce those duties. The citizen suit provision provides firm evidence of Congress' intent to have vigorous private enforcement of the Act occur.

The statute defines the appropriate scope of the standing inquiry. Without the Endangered Species Act, even the intentional killing of species near extinction would not be actionable, much less the failure of federal agencies to account for the effects of their actions on such species through consultation with the Secretary. Because of the Act, the increased risk of harm to endangered species which stems from the lack of consultation is a legal injury. Consultation itself reduces this injury, this risk of harm.

Defenders is the proper party to seek relief from the harm caused by lack of consultation. In reviewing a similar citizen suit provision this Court held that the provision, "was intended by Congress to allow suits by all persons possessing standing under this Court's decision in *Sierra Club v. Morton*." *Middlesex County Sewerage*

Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 16 (1981). Defenders meets that standard.

Furthermore, by including a citizen suit provision in the Act specifically encompassing suits against the United States (including the Secretary), Congress has provided for judicial review of agency administrative rulemakings at a higher level of generality than would ordinarily be the case under, for instance, the Administrative Procedure Act. *Cf. Lujan v. National Wildlife Fed'n*, 111 L. Ed. 2d at 719-20. A facial challenge to the 1986 rule presents the type of clean legal issue Congress intended the courts decide when it included the citizen suit provision in Section 11 of the Endangered Species Act.

B. The Extensive Factual Record Proves That Defenders Has Standing

In *Defenders II*, on review of cross-motions for summary judgment, the Eighth Circuit had before it a fully developed factual record on the standing issue. The Eighth Circuit also carefully applied this Court's most recent case relating to standing in the context of motions for summary judgment, *Lujan v. National Wildlife Fed'n*. The Eighth Circuit concluded, "Defenders had met its burden of proving standing at the summary judgment phase of the litigation." 911 F.2d at 120. The factual findings of the district court on standing, revisited by the Eighth Circuit, are not clearly erroneous. *Cf. Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72, 74 n.19 (1978).

1. *Defenders And Its Members Have Been Injured By The Failure To Consult*

The record before the Court demonstrates that the respondent organizations and their members have a professional and personal interest in Section 7 consultations being performed upon federal agency actions which may affect listed species overseas. The Secretary's 1986 rule harms those interests. The following section summarizes

the record evidence on the interests of Defenders and certain of its members who gave testimony in this action.

Defenders of Wildlife is an environmental organization formed, "to preserve, enhance and protect the natural abundance and diversity of wildlife including the integrity of natural wildlife ecosystems." J.A. at 116. Defenders of Wildlife addresses, "international [wildlife] issues primarily through the avenues of influence provided by domestic government and international non-governmental organizations." J.A. at 101. A reduction in biodiversity will harm Defenders as an organization.

Defenders of Wildlife has been actively involved in the negotiation and implementation of international wildlife treaties. Defenders of Wildlife has had official representatives at CITES, where "[their] unique expertise has often been solicited by governmental delegates." J.A. at 103.

Defenders of Wildlife informs its members about international wildlife issues through the publication of articles in *Defenders* magazine. Defenders of Wildlife members and staff actively seek out international wildlife viewing experiences for pleasure and for professional reasons. *See, e.g.*, Affidavits of H. Elliott McClure, Maxine McCloskey, Joyce Kelly, and Amy Skilbred. J.A. at 119, 135, 100, 144.

H. Elliott McClure is a member of Defenders of Wildlife and has been since the early 1950's. He has been a member of the Board of Directors for Defenders of Wildlife and was Chairman of the Tropical Wildlife-International Committee at the time he gave his affidavit. Dr. McClure received his doctorate in wildlife conservation in 1941. He worked in Southeast Asia as an ecologist for the Walter Reed Army Institute of Research for 25 years, has authored over 125 publications with a heavy emphasis on wildlife conservation, and has studied and observed many species which were, or have since become, endangered. J.A. at 120. Such species include wild elephants,

the one-horned rhinoceros, several species of monkeys and several species of birds, notably hornbills. J.A. at 284. Dr. McClure continues to supervise research on threatened and endangered species, especially research concerning the hornbills of Southeast Asia which he started in 1963. J.A. at 285. "The entire family [of hornbills] in Southeast Asia, about 35 species, are all endangered." *Id.*

In 1983 Dr. McClure led a group of 25 people to Malaysia, Sumatra and Borneo to view wildlife. J.A. at 280. During that trip Dr. McClure also visited Thailand and Japan to check on his research. J.A. at 281. Dr. McClure intends to return to this area and continue to view wildlife and update his research, health permitting. J.A. at 286.

World Bank and Bureau of Reclamation dam projects occurring in both Thailand and Malaysia threaten endangered wildlife that Dr. McClure has observed and studied. J.A. at 282-283. These projects include the Nam Choan Dam on the Kwae Yai River in Thailand, and the Temenggor Dam in Malaysia, J.A. at 120-21,[3] as well as

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[3] While the lower courts did not need to reach the issue to determine that Defenders had proven standing, it is clear that U.S. agency action within the meaning of Section 7 accompanies development projects funded by the World Bank. While the World Bank is not itself a federal agency, the Secretary of the Treasury has authority to instruct the vote of the United States' representative on the board of executive directors of the World Bank (the United States possesses almost 20% of the votes on that executive board). Exec. Order No. 11,269, 31 Fed. Reg. 2813 (1966), *reprinted in* 1966 U.S. Code Cong. & Admin. News 4622; 22 U.S.C. §§ 286-286kk. In addition, the Endangered Species Act defines "federal agency" to be "any department, agency, *or instrumentality* of the United States." 16 U.S.C. § 1532(7) (emphasis added). World Bank loans require federal agency action by the Treasury Department. Both the Treasury and the World Bank are "instrumentalit[ies] of the United States" subject to Section 7 of the Endangered Species Act when United States money is used to finance development projects abroad through the Bank.

Congress has recognized and in the past used U.S. agency control over votes on the governing boards of the World Bank and its sister

the U.S. Bureau of Reclamation's planned dam projects in the Lower Mekong River Basin in Thailand, J.A. at 121.

These projects "may affect" endangered and threatened species and their habitats and would be subject to Section 7 consultation but for the 1986 rule. "If the Nam Choan Dam goes ahead, then the largest population of Asian elephants in Thailand, as well as other threatened species such as the guar and tapir, could face destruction." J.A. at 94. The Temenggor Dam Project threatens the survival of, "100 species of mammals and 300 species of birds. Most of these species are already near extinction. Most severely affected have been the Sumatran rhinoceros, the Malayan tapir, the Malayan elephant and the flying lemur." J.A. at 95. Larger than the previously described projects, the Lower Mekong River Basin Project proposes a dam, "the size of the Grand Coulee with a reservoir that could irrigate 2 million hectares." J.A. at 63.

Lack of Section 7 consultation on these and other U.S. funded projects in Southeast Asia has and will continue to cause irreparable harm to Dr. McClure. J.A. at 121. As well as suffering the emotional harm that would come from the increased risk of extinction to species that he has worked with, Dr. McClure would suffer professional harm, "because [his] professional research and people

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institution stemming from the 1944 Bretton Woods conference, the International Monetary Fund, to advance United States policy interests overseas. *See, e.g.*, 22 U.S.C. § 286aa(a) ("[T]he Secretary of the Treasury shall instruct the United States Executive Director of the [International Monetary] Fund to actively oppose any facility involving use of Fund credit by any Communist dictatorship . . . ."); 22 U.S.C. § 286aa(b) (similar instruction with regard to countries practicing apartheid); 22 U.S.C. § 262m-2, 4, 5, 7 (the Secretary of the Treasury shall instruct the United States Executive Director at, *inter alia*, the World Bank, to give appropriate consideration to environmental concerns in decisionmaking).

that are carrying it on would be forced to stop." J.A. at 284.

Joyce M. Kelly was the Chief Executive Officer and a member of Defenders of Wildlife at the time of her affidavit. She previously worked for over a decade in conservation and natural resource management, including directing the Wilderness Program of the Bureau of Land Management of the United States Department of the Interior. J.A. at 100.

Ms. Kelly has visited Israel and Egypt to observe the habitat of the Eurasian peregrine falcon and the Nile crocodile, both of which are endangered; she has attempted to observe the animals themselves. J.A. at 100-101. The rehabilitation of the Aswan High Dam on the Nile, which is being overseen by the U.S. Bureau of Reclamation, will affect the habitat of the endangered Nile crocodile, including the area where Ms. Kelly visited. J.A. at 101. She intends to return to the area to try to view and study the crocodile. *Id.* Ms. Kelly will suffer both professional and personal harm if the Aswan High Dam rehabilitation project continues without Section 7 consultation. *Id.*

Ms. Kelly identified a project, the Aswan Dam rehabilitation, undertaken with U.S. agency action, which would affect habitat of an endangered animal, the crocodile, which she had visited. A project affecting habitat of an endangered species meets the "may affect" standard of Section 7. The Secretary never rebutted Ms. Kelly's testimony and it stands as offered.

Amy Skilbred is a member of Defenders of Wildlife and a wildlife biologist. J.A. at 309. Ms. Skilbred studied the area affected by the World Bank's Polonoroeste project in Brazil while a graduate student at Johns Hopkins. J.A. at 321-22.[4]

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[4] The effects of the Polonoroeste Project could be to accelerate destruction of forests in Rondonia, leading to the deforestation of

Ms. Skilbred has traveled extensively to study wildlife. She has traveled to Sri Lanka specifically to seek endangered wildlife and to study wildlife habitat at the site of the U.S. Agency for International Development's ("AID") Mahaweli Dam project, where listed endangered species including leopards and Indian elephants exist. J.A. at 317. She determined-she had been at the specific site of the Mahaweli project through review of an Environmental Assessment prepared by AID. *Id.*

The U.S. Fish and Wildlife Service has recognized that the Mahaweli project, "could have massive environmental impacts on such an insular ecosystem as the Mahaweli River system," J.A. at 215, easily meeting the "may affect" standard triggering Section 7 consultation. This project could be particularly disastrous for the Asian elephant as it will destroy a migration route and a vital feeding ground for that animal. J.A. at 92. This project will also, "seriously affect the habitat of many animals, including the Indian elephant, the leopard, the red-faced malkoha (which is endemic to Sri Lanka) the swan crocodile, the estuarine crocodile, the Bengal monitor and the python." J.A. at 95. *See also* J.A. at 78 (FWS internal memo). In addition, the project will reduce the habitat of a number of threatened species endemic to the island. J.A. at 95.

At her deposition Ms. Skilbred succinctly illustrated the nature of the harm to her interests if the Mahaweli project goes forward without Section 7 consultation:

> Q: And for what purpose would you like to go back to Sri Lanka to visit the Mahaweli Project?
>
> A: *I'd rather go back to visit the wildlife that live in the area* of the Mahaweli Project . . . .

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the entire state. The result of this deforestation would be that, "untold numbers of species of plants and animals will become extinct as the forest disappears." Plaintiffs' Appendix to the district court in *Defenders I*, Volume I at 12.

J.A. at 318 (emphasis added). She testified as to her fixed intention to return to the site. J.A. at 320-21. The specific date of her return is irrelevant—if the endangered species are eradicated by the project, they will be gone for the rest of time.

The Humane Society of the United States ("HSUS") has been actively involved in international protection and management of wildlife for more than ten years. HSUS has funded both a study to determine problems occurring as a result of development of the tropical rain forests and an investigation into the conservation and humane treatment of wild birds in foreign countries. HSUS also conducts wildlife viewing tours to Africa for the benefit of HSUS members.

John Grandy is a member and officer of the Humane Society of the United States. Dr. Grandy received his Ph.D. in wildlife ecology. He has been a wildlife specialist for the National Parks and Conservation Association, has served as staff assistant to the Senior Scientist at the President's Council on Environmental Quality, has served as Executive Vice President of Defenders of Wildlife and has been appointed to three major advisory committees to the U.S. Department of the Interior. Dr. Grandy participated in the negotiation of CITES in 1971, 1972 and 1973. He was a member of the U.S. Delegation to CITES in 1977, and has attended the meetings as an observer since 1979 and as a representative of HSUS since 1981. Dr. Grandy is an expert "in the fields of wildlife management, ecology, and biology." Affidavit of J. Grandy at ¶ 3; Defenders' App. at 2a.

Dr. Grandy has visited numerous countries both to participate in professional wildlife conservation meetings and to view wildlife. For example, in 1983 Dr. Grandy visited Botswana to attend the CITES meeting and to observe wildlife. J.A. at 263-64. In 1985 he visited Argentina for similar purposes. J.A. at 264. Dr. Grandy is aware of U.S. funded projects in both of these countries.

J.A. at 264. In 1988 he led two wildlife/endangered species sightseeing tours for HSUS throughout Kenya. These tours visited natural areas where U.S. funded projects were underway. J.A. at 265-66.

Dr. Grandy plans to return to these areas, principally in Africa, for both professional and personal reasons. J.A. at 266-67. Lack of Section 7 consultation by U.S. agencies has and will continue to cause both professional and personal injury to Dr. Grandy.

J. Campbell Plowden is a member of the Humane Society of the United States and a wildlife biologist. J.A. at 139. Mr. Plowden has made professional visits to various countries in South America and Southeast Asia to "study and enjoy the endangered and threatened wildlife." J.A. at 140. While in Brazil and Peru in 1986, Mr. Plowden observed the habitat of many endangered species including the jaguar, Uakari, and the Geoldi's marmoset. J.A. at 141. U.S. AID's Picchis-Palcazu forestry project "may affect" the ecosystem encompassing the species and habitat studied by Mr. Plowden. J.A. at 141, 293-94.

Mr. Plowden plans to return to areas in South America, including the Picchis-Palcazu project area, in order to observe and study endangered species. J.A. at 142 and 295. Mr. Plowden identified endangered species within the ecosystem in which the Picchis-Palcazu project occurs, J.A. at 141, 293, providing sufficient evidence to meet the "may affect" standard triggering Section 7, but for the 1986 rule. Mr. Plowden will suffer both professional and personal harm if this U.S. funded project does not receive Section 7 consultation. J.A. at 142.[5]

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[5] The Secretary contends in his brief at 7 n.2 that AID's support for the Picchis-Palcazu project ended in 1990, citing the Affidavit of James Hester (Gov't C.A. Reply Br. Addendum at 14). Mr. Hester's affidavit is, at best, equivocal. It states only that there was a "project assistance completion date" for a phase of the project in

In *Sierra Club v. Morton*, this Court held that an environmental organization did not have standing as it had, "failed to allege that it or its members would be affected in any of their activities or pastimes." 405 U.S. at 735. That case still provides the soundest basis for analyzing standing in environmental actions. The record in this case demonstrates that Defenders' members have a personal interest in Section 7 consultations being performed on federal agency actions which may affect listed species overseas. Both the respondent organizations and the members who have given testimony by affidavit and deposition in this case have shown a wide range of connections between their interests in endangered species abroad and U.S. agency actions which may jeopardize those species and harm those interests. These connections all rest at root on the personal, professional, and aesthetic interests identified in *Sierra Club v. Morton* as a sufficient basis for standing.

Geographic Nexus—Defenders and its members possess a geographic nexus to the agency actions at issue in the narrowest, most traditional sense: Amy Skilbred and Joyce Kelly have been physically present at federally funded project sites for the purpose of studying endangered species and their habitat, species and habitat which the projects "may affect," requiring Section 7 consultation. Under any reasonable interpretation of cases from *Sierra Club v. Morton* to *Lujan v. National Wildlife Fed'n*, personalized professional and aesthetic injury so tightly tied to a specific project location will support standing.[6] The Secretary admitted as much in *Defenders I*, 851 F.2d at 1041.

September 1990, but does not indicate what that term involves, nor that AID is not interested in pursuing the project.

[6] The contention in the Secretary's brief at 23 that Defenders' members must constantly camp out at a project site to possess standing is simply absurd. No case has ever come close to so holding. The point of the standing inquiry is to ensure that Defenders and its members have, " 'such a personal stake in the outcome of the con-

Ecosystem Nexus—Defenders and its members also possess standing based upon an ecosystem nexus. In passing the Endangered Species Act, Congress declared as its purpose, "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . ." 16 U.S.C. § 1531(b). In light of Congress' declaration that it intends to attack the problem of diminishing animal species at the level of generality of an ecosystem (and again in light of the citizen suit provision), Defenders possesses standing based upon the injury suffered by its members who use and enjoy any part of a contiguous ecosystem affected by federal action for purposes of studying or observing endangered species located in that ecosystem, even if the federal agency action which is damaging those interests is located some distance away from the tracts used by Defenders' members. For instance, in the context of a citizen suit under the Endangered Species Act, the argument made to the court of appeals by the Secretary that the decision in *Lujan v. National Wildlife Fed'n* denied Defenders standing based upon J. Campbell Plowden's testimony that he had worked in the ecosystem in which the Picchis-Palcazu project occurred was incorrect. *Cf.* 911 F.2d at 121 n.2 ("[t]he evidence showed that Plowden came only within several hundred miles of the Picchis-Palcazu project in Peru"). At his deposition, Mr. Plowden identified the ecosystem nexus between his work with endangered species and the threat to that work posed by AID's Picchis-Palcazu forestry project:

> Q: Would the Picchis-Palcazu project have had an impact on the population of jaguars, Uakari and Geoldi's marmoset for the area in which you visited?
>
> A: Yes. It could have.

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troversy as to assure that concrete adverseness which sharpens the presentation of issues.'" *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. at 72. The testimony of, *inter alia*, Amy Skilbred clearly shows that Defenders fulfills this purpose.

Q: Why is that?

A: The area that I visited and the area of the Picchis-Palcazu project are contiguous areas of tropical moist forest and reducing the population in one area affects the population in its entirety, reducing the size of the gene pool and making it that much more vulnerable to catastrophic events.

J.A. at 293-94. Such injury is sufficient to support standing under the Endangered Species Act's citizen suit provision.

In *Lujan v. National Wildlife Fed'n* Congress had not given the courts any guidance concerning at what level of generality, if any, they should look in identifying injury; e.g., how much of a national forest must be used by a plaintiff or affected by agency action before injury has occurred? In the Endangered Species Act, in Section 2, Congress specifically identified the level of generality at which injury can occur as the ecosystem level. Mr. Plowden identified personalized injury to his interests from AID's Picchis-Palcazu project at the congressionally mandated level of generality; that injury supports Defenders' standing to bring this action.

Animal Nexus—Defenders and its members also possess standing based upon an animal nexus. In cases involving wildlife statutes, this Court's decisions have recognized that a strict geographic nexus test for standing is not appropriate; concern should focus more on the specific species of animals which a plaintiff studies or enjoys. *See, e.g., Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) ("whale watching" identified as the protectable interest, regardless of geographic separation of whale watching activities from Japan's whale taking activities).

Obviously all of Defenders' members who have suffered harm based upon the strict geographic nexus test and the ecosystem nexus test have also suffered harm under

an animal based standard. *E.g.*, Amy Skilbred's interest in studying specific animals—leopards and Indian elephants—has been harmed by AID's Mahaweli Dam project, the site of which she has visited. Dr. Elliot McClure, however, has suffered injury based largely on an animal nexus. He has identified numerous endangered species, notably the hornbill family of birds, which he has spent a professional lifetime studying in Southeast Asia. Now those birds are threatened by projects carried out with the assistance of U.S. agency action, but without the protective benefits of Section 7 consultation. Just as the interests of the members of the American Cetacean Society in whale watching were legally injured by geographically distant taking of whales by Japanese whalers, so to Dr. McClure's interest in continued research and study of hornbills and other endangered species is harmed by the lack of Section 7 consultation on the World Bank's Nam Choan Dam and Bureau of Reclamation river projects in Thailand.

Vocational Nexus—Defenders and its members also possess standing based upon a vocational nexus. This Court has long recognized that persons with a professional interest in any given issue have a heightened stake in that matter, sufficient to support standing. For instance, in *Rust v. Sullivan*, there was no serious question but that professional health care providers possessed standing to challenge abortion counseling regulations which could limit their professional work. In this case, many of the Defenders members who gave testimony depend upon the existence of certain endangered species for their professional scientific activities. Amy Skilbred, Campbell Plowden, Dr. McClure, and Dr. Grandy are all wildlife biologists studying these rare animals and their habitats. If the Section 7 consultation process is not applied to U.S. agency actions that may affect those species, those individuals will lose their professional identity. They will be transformed from wildlife biologists into wildlife historians. As Amy Skilbred testified, "I'd rather

go back to visit the wildlife that live in the area of the Mahaweli Project." She has the right as a biologist to protect that vocational interest in federal court.

2. *Defenders' Injury Is Traceable To The Secretary's Rule And Redressable By The Relief Sought*

Defenders fully meets the causation element of standing. The types of harm Defenders and its members have suffered fall squarely within the types of harm the Endangered Species Act aims to relieve. Congress designed the Section 7 process specifically to reduce the risk of harm to endangered species from federal actions. The Secretary has issued a final rule refusing to implement that process on any agency actions affecting species abroad. The Section 7 process has worked successfully domestically for eighteen years to improve federal projects and alleviate potential harm to endangered species. The Section 7 process will work to protect species abroad.[7]

The respondents' injury is directly traceable to the Secretary's actions. The Secretary's rule change has foreclosed the possibility of Section 7 consultations on numerous ongoing and proposed federal agency actions overseas, including the Mahaweli Dam project in Sri Lanka, the Aswan High Dam rehabilitation project in Egypt, and the Picchis-Palcazu project in Peru. The lack of consultation on these actions which "may affect" endangered species is what increases the risk of harm to those species and damages Defenders' interests.

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[7] The courts of appeals are unanimous in holding that, in order to demonstrate traceability and redressability, plaintiffs seeking to force a governmental entity to perform a statutorily required study need not prove that the study's outcome will necessarily alter the project creating the underlying harm. Such a requirement would illogically force the plaintiff to perform the very study the government has been derelict in conducting. *See, e.g., City of Davis v. Coleman*, 521 F.2d 661, 670-71 (9th Cir. 1975); *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 428 (1st Cir. 1983); *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1380 (9th Cir. 1986).

The Secretary complains that Defenders should be seeking injunctions against the action agencies, not him. Such action would be pointless until the Secretary has been enjoined to comply with his duty to conduct consultations with agencies engaged in actions affecting species overseas. The Secretary now, by final regulation, refuses to consult. He is primarily responsible for enforcing the Act. *See, e.g.*, 51 Fed. Reg. at 19928 (1986); J.A. at 245. The logical step for Defenders to take is to seek to bring him into compliance with the statute he administers.[8]

In *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982), this Court held that:

> [A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve

[8] The Secretary's contention that the Court should not decide the legality of the 1986 rule in this action because he is the only defendant and the action agencies have not had an opportunity to provide their views, Brief of Sec'y at 25, is specious. From the first in this litigation, the Department of State and the Administrator of AID have been full participants in formulating the Secretary's legal strategy. *See, e.g.*, Defendants' Motion to Dismiss, District Court Docket Entry No. 6 at 2, J.A. at 1, identifying attorneys from the Department of Interior; Mark S. Ward and Jerome A. Patterson from U.S. AID; and David Colson and Deborah Kennedy from the Department of State to be of counsel to the attorneys from the Justice Department in this action. Attorney Ward entered a formal appearance before the district court on behalf of U.S. AID. *See* Memorandum Order dated Feb. 25, 1987, District Court Docket Entry No. 12, at 1, J.A. at 2. Having entered such an appearance, AID may well be bound by the resulting judgment of the Eighth Circuit. In requesting extensions of time from the lower courts for various activities, the reason given by the Secretary for the need for more time has consistently been to allow for consultation with the Department of State. *See, e.g.*, Appellee's Motion to Extend Until June 26, 1987, the Time in Which to File His Brief [in *Defenders I*] at 1-2 ("An extension is necessary for the Department of Justice to consult with the Department of the Interior and the Department of State [on] the brief."). In addition, U.S. AID officials have offered testimony in this action. *See, e.g.*, Affidavit of Norman Cohen, J.A. at 158.

> a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury.

(Emphasis in original; citations omitted.) The Court should not let the Secretary define what Defenders purportedly wants, and then build artificially attenuated chains of causation. *Cf.* Fletcher, *The Structure of Standing*, 98 Yale L.J. at 239-43.

The Section 7 consultation process will redress the respondents' injuries by helping to conserve species abroad. Congress, and government agencies themselves (including the Secretary of the Interior), all have specifically identified the remedial aspects of consultation.

Congress has on numerous occasions indicated its belief that the Section 7 consultation process reduces the risk of harm to endangered species. In the legislative history to the 1979 amendments to the Act, Congress stated, "This consultation process is central to the resolution of conflicts under the act." H.R. Rep. No. 167, 96th Cong., 1st Sess. 5 (1979).

Congress has never during the eighteen year existence of the Act attempted to narrow the scope of consultation or diminish its impact or importance. Congress has steadfastly pointed to "a strong record of timeliness" and "adequacy," and has found that consultation has resulted in the improvement of proposed federal agency actions. H.R. Rep. No. 567, 97th Cong., 2d Sess. 13 (1982). Throughout the process of amending the Act in 1978, Congress remained convinced that, "in many instances[,] good faith consultation between the acting agency and the Fish and Wildlife Service can resolve many endangered species conflicts." H.R. Rep. No. 1625, 95th Cong., 2d Sess. 12 (1978). The basic premise of the 1978 amendments was to insure, "that the integrity of the interagency consultation process designated under section 7 of the act be preserved." H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978).

This Court should enforce Congress' choice of remedy for thoughtless agency action destructive of endangered

species—the Section 7 consultation process. In *Defenders I* the Eighth Circuit agreed that, "Congress has determined that the remedy for the harm to [Defenders'] members' personal, professional, and aesthetic interest in endangered species is consultation between the Secretary and the action agency." 851 F.2d at 1043. The Eighth Circuit's rationale was not a simplistic finding that Congress had "legislated" the requisite finding of causation. Rather, the Eighth Circuit looked in a factually complex area to the judgment of the representative branch that a system of informed consultation would most effectively protect endangered species from unthinking extermination carried out in whole or in part by federal agency action. That judicial deference to Congress was appropriate. *Cf.* Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 Wis. L. Rev. at 77-81.

Not only has Congress chosen consultation as the remedy to redress respondents' injuries; federal agencies acknowledge that consultation will, in fact, reduce risk to endangered species. The Secretary acknowledges consultation's effectiveness: "The two Services believe that these procedural regulations promote the conservation of listed species . . . ." 51 Fed. Reg. at 19928 (1986) (quoting 43 Fed. Reg. at 871 (1978)).[9] The Director of the Fish and Wildlife Service stated in connection with the Mahaweli project that because the government of Sri Lanka, "lacks the necessary finances to undertake any long-term management programs to avoid the negative

[9] The Secretary's contention in his brief at 25 that federal action agencies could simply ignore the results of a Section 7 consultation and proceed with an unmodified project which would jeopardize an endangered or threatened species is wrong. To the extent that the appellate cases cited by the Secretary imply that conclusion, *TVA v. Hill* has clearly made such decisions bad law. In *TVA v. Hill*, 437 U.S. at 185-186 n.31, this Court stated that nothing in the Act's legislative history supported such a conclusion, and that an agency which ignored the results of a Section 7 consultation would be susceptible to an action for injunctive relief brought either by the Secretary or by any person under 16 U.S.C. § 1540(g).

impacts to the wildlife," U.S. agencies, "will be the key as to how successfully the wildlife is preserved." J.A. at 216. The Director went on to conclude that, "If wildlife problems receive the same level of attention as the engineering project, then the negative impacts to the environment can be alleviated." J.A. at 216.

Indeed, the vehemence with which the Secretary has insisted throughout this litigation that applying the Section 7 process to agency actions abroad will disrupt planning and foreign relations strongly suggests that he recognizes the ability of the Section 7 process to reduce risk to endangered species. *See, e.g.*, Brief of Secretary at 31-32 and 44 n.34; Pet. of Sec'y at 20-21 and n.7; Brief of Appellant in *Defenders II* at 31, 34, 45; Reply Brief of Appellant in *Defenders II* at 11; Appellant's Petition for Rehearing *En Banc* in *Defenders II* at 15.

Defenders is confident that if this Court affirms the judgment of the lower courts, making consultation available to action agencies, those agencies will consult with the Secretary as appropriate. The Justice Department has represented that it would undertake to enforce the Court's ruling. At the deposition of Steven Schroer the following colloquy occurred:

> THE WITNESS:
>
> I firmly believe and trust that when Judge Alsop and the Court of Appeals and the Supreme Court, if it gets that far, direct the agencies to consult, as I think they will, that they will now comply with the law even if they haven't in the past. That's the remedy that I'm looking for to protect my own personal interests in these matters.
>
> MR. SHOCKEY [Justice Department]:
>
> You can rest assured the Justice Department will advise the agencies to do so if that should happen.

J.A. at 307.

In *TVA v. Hill*, 437 U.S. at 178, this Court held that the purpose of the Endangered Species Act was, "[t]he institutionalization of . . . caution," quoting H.R. Rep. No. 412, 93rd Cong., 1st Sess. 4-5 (1973). Congress created the Section 7 process to provide this institutionalized caution. *See, e.g.*, the description of the Section 7 process contained in H.R. Rep. No. 567, 97th Cong., 2d Sess. 10-11 (1982). In *Defenders I*, the Eighth Circuit held that Defenders had alleged a threat of an increased rate of extinction of endangered species absent consultation, and a procedural harm from the failure of the Secretary to conduct Section 7 consultations. 851 F.2d at 1039-1041. In *Defenders II*, on review of a factually developed record, the Eighth Circuit concluded that Defenders had proven those harms.[10] 911 F.2d at 120. Compelling the Secretary to conduct Section 7 consultations on agency actions which may affect endangered or threatened species abroad will provide the element of "institutionalized caution" that will redress Defenders' injury stemming from the threat of an increased rate of extinction of listed species, and will (obviously) redress the procedural harm which Defenders has suffered. Defenders has standing.

II. SECTION 7 APPLIES TO AGENCY ACTIONS THAT MAY AFFECT ENDANGERED SPECIES ABROAD

The court of appeals properly held that the plain language of the Endangered Species Act demonstrated Congress' intent that Section 7 consultations be performed on agency actions which may affect listed species abroad. 911 F.2d at 123. In this situation, the court of appeals owed no deference to the Secretary's unlawful construction of the Act. *Chevron U.S.A., Inc. v. Natural Re-*

[10] The argument of the Secretary that the Eighth Circuit has read a supposed "geographical nexus" requirement out of the law on procedural injury, Brief of Sec'y at 30, is irrelevant to deciding this case in light of the proof that Defenders' members have indeed visited sites of federally funded development projects for the purpose of observing endangered animals and their habitat.

sources Defense Council, Inc., 467 U.S. 837, 843 n.9 (1984).

A. The Plain Language Of Section 4 And Section 7 Of The Endangered Species Act Mandates Application Of Section 7 To Federal Agency Actions That May Affect Species Abroad

The key to this case is the relationship of the Section 4 listing requirement to the Section 7 consultation duty. Secton 4, 16 U.S.C. § 1533(b), requires the Secretary to list foreign endangered species, and he does so. Almost half of all species listed pursuant to Section 4 are foreign to the United States. *See* 50 C.F.R. § 17.11. Section 7 requires "[e]*ach*" federal agency to consult on "*any* action" to insure that such action does not jeopardize "*any* endangered species or threatened species." By Section 4 of the Act, endangered and threatened species specifically include species whose primary range is outside the United States. The Act, on its face, leaves no room for argument. *See TVA v. Hill*, 437 U.S. at 173, and 184 n.29. As the district court held:

> The language and mandate is all inclusive; it could not be more broad. Consultation must occur whenever an action endangers *any endangered species*. Endangered species exist outside the boundaries of the United States and high seas, therefore, consultation must occur if an action in a foreign land affects an endangered or threatened species there.

707 F. Supp. at 1084-85 (emphasis by the court). Congress directed the Secretary to list species within and outside of the United States, and to consult on "any actions" affecting "any" such species.

B. Other Sections Of The Act Support Applying Section 7 To Federal Agency Actions That May Affect Species Abroad

Numerous provisions of the Act and its legislative history make reference to the international wildlife obligations of the United States and to the international

scope of wildlife conservation. Read together and in light of the plain language of Sections 4 and 7, these provisions place in context Congress' awareness of the international nature of wildlife preservation and the congressional intent to have Section 7 apply to all federal actions.

Defenders has already described in detail the international goals Congress sought to achieve and the international wildlife commitments it sought to fulfill in passing the Endangered Species Act.

Congress' concern for preservation of endangered wildlife worldwide finds further reflection in Section 8(b) of the Act, 16 U.S.C. § 1537(b). That section provides that, "The Secretary [of the Interior], through the Secretary of State, shall encourage—(1) foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to [Section 4]. . . ." Eliminating the application of Section 7 to United States agency actions that may affect species abroad would seem a poor way for either Secretary to meet this duty.

The exemption provisions of Section 7(e)-(p), 16 U.S.C. § 1536(e)-(p), imply that the consultation provision of Section 7(a)(2) is applicable to agency actions that may affect species abroad. The statutory language of the exemption clauses provides that, "the Governor of the State in which an agency action will occur, *if any*, . . . may apply to the Secretary for an exemption . . . ." 16 U.S.C. § 1536(g)(1); (g)(2)(B) (emphasis added). The "Governor . . . *if any*" language clearly envisions the statute encompassing agency actions that would not affect any state's governor, such as those affecting wildlife abroad. The Secretary's argument that the *if any* phrase may simply assume coverage of activities on the high seas strains unnecessarily the statutory language. The statutory language should be given its ordinary meaning—the statute covers all those agency actions that

affect governors, and all those that do not, including actions affecting listed species in other nations.

Additional authority supporting application of Section 7 to federal agency action overseas is found in the judicial review provided for exemption decisions. Judicial review of such decisions is provided, "in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia . . . ." 16 U.S.C. § 1536(n). This provision provides for adjudication of Section 7 disputes that arise outside of the territorial United States.[11]

The Secretary in his reading of the language of the Act wrongly attempts to compartmentalize the statute into severable sections, some dealing with international aspects of the problem of species extinction, others with

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[11] The Secretary argues that Congress would not have conditioned an exemption on the finding of "regional or national significance," 16 U.S.C. § 1536(h)(1)(A)(iii), if application to projects affecting species in foreign countries were intended. But the Secretary maintains that the scope of the Section 7 consultation requirement *does* include federal actions on the high seas. The exemption provision under the Secretary's interpretation, however, would be equally as inapplicable to actions affecting species on the high seas as it would be to actions affecting species in foreign nations. For this reason, the Secretary's argument is inconsistent with his own new interpretation of the scope of Section 7.

The Secretary also argues that the Secretary of State's participation on the exemption committee would have been required if Section 7 applied to actions affecting species in foreign nations. The Secretary ignores the fact that the Secretary of State is not an expert on endangered or threatened species. (State governors have access to wildlife expertise in their states' fish and game departments.) Congress provided for participation of the Secretary of State when such participation is warranted; for example, in the determination of whether an exemption would violate a treaty obligation of the United States. 16 U.S.C. § 1536(i).

domestic aspects of the problem. The Secretary must studiously ignore the fact that Congress constructed the Act to provide a global response to the disappearance of wildlife.

For instance, the Secretary argues that Section 8 of the Act, 16 U.S.C. § 1537, and only Section 8, embodies Congress' response to the problem of worldwide extinction of species. When one steps back to look at the overall structure of the statute, it is clear that Section 8 is merely part of a larger statutory triumvirate:

Section 6, 16 U.S.C. § 1535, Cooperation with States

Section 7, 16 U.S.C. § 1536, Interagency cooperation

Section 8, 16 U.S.C. § 1537, International cooperation

There is overlap and interplay among these three sections. Surely the Secretary would not argue that, because there is a separate section of the Act dealing with federal "Cooperation with States," the Section 7 consultation requirement does not apply to federal agency actions occurring in the United States. Likewise, the fact that Congress wanted a cooperative relationship on wildlife issues with foreign nations does not in any way imply that United States agencies can freely ignore their duties under Section 7 because the animals they may destroy are located overseas.

C. The Legislative History Of Section 4 And Section 7 Of The Act Mandates Application Of Section 7 To Federal Agency Actions That May Affect Wildlife Abroad

Support for a plain reading of Section 7's requirements also comes from repeated statements in the legislative history of the Act and its amendments. In particular, the history of the 1978 amendments to Section 7, Pub. L. No. 95-632, § 3, 92 Stat. 3751 (1978), indicates that Congress intended to codify the 1978 rule, including its provisions regarding federal agency actions that may affect protected wildlife in other nations.

Section 7 received modest treatment in the committee reports on the initial Act. *See* H.R. Rep. No. 412, 93rd Cong., 1st Sess. 14-15 (1973); S. Rep. No. 307, 93rd Cong., 1st Sess. 8-9 (1973). However, Congressman Dingell, chairing the House hearings on the 1973 Act, made clear that it was aimed at protecting species worldwide:

> The point I want you to come around to understand is that this country wants a management program that is going to maintain these populations *around the world.*

Hearings on Endangered Species [H.R. 37 and Others] Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 93rd Cong., 1st Sess. 349 (1973) (emphasis added) (cited in J.A. at 169).

Thereafter began the consultations among the Department of the Interior and other federal agencies that resulted in the "Guidelines to Assist Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973." The Fish and Wildlife Service, the relevant lead agency on the Act within Interior, transmitted the Guidelines to all federal agencies on April 22, 1976. J.A. at 26. The Secretary received 40 comments on the Guidelines from federal agencies, and after further revisions issued a Notice of Proposed Rulemaking on January 26, 1977. 42 Fed. Reg. 4868 (1977).

The proposed rule explicitly stated that Section 7 applied to agency actions in other nations:

> [Section 7] requires every Federal agency to insure that its activities and programs in the United States, upon the high seas, and *in foreign countries* will not jeopardize the continued existence of a listed species.

42 Fed. Reg. at 4871 (emphasis added). The proposed rule received further extensive comment and led to final rulemaking on January 4, 1978. 43 Fed. Reg. 870 (1978).

None of the comments from federal agencies indicated that application of Section 7 consultation to agency actions overseas would be contrary to law. Rather, several key actors in the rulemaking process—the Council on Environmental Quality, J.A. at 161; the Interior Department's Solicitor's Office, J.A. at 181; and the General Council's Office of the National Oceanic and Atmospheric Administration—took the position that the Act's requirement that federal agency actions not jeopardize the existence of listed species was applicable to listed species abroad.[12]

The comments of the Interior Department's Solicitor's Office on the proposed 1978 rule were particularly well-reasoned and detailed in explaining why, based upon, "the language of the section, the wording of other portions of the Act, and the Act's legislative history," J.A. at 182, Section 7 required the Secretary to consult on agency actions that may affect listed species abroad. After reviewing that history, the Secretary's lawyer concluded:

> [T]he legislative history for the Act as a whole shows that the statute is aimed at protecting *foreign* species, and *every* federal agency is committed to this protection. In light of this overall purpose, any argument that the jeopardy clause is not applicable to foreign activities is simply devoid of logic.

J.A. at 183 (emphasis in original).

That portion of the final rulemaking concerning application of Section 7 tracked the provisions of the proposed rulemaking exactly:

> Section 7 . . . requires every Federal agency to insure that its activities or programs in the United States,

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[12] This dispute among federal agencies was conducted publicly as well as internally. On the question of application of Section 7 abroad, the Notice of Proposed Rulemaking gave a lengthy account of the issues and the various agencies' positions. 42 Fed. Reg. at 4869.

> upon the high seas, *and in foreign countries* will not jeopardize the continued existence of a listed species.

50 C.F.R. § 402.01 (1978), 43 Fed. Reg. at 874 (emphasis added). This provision was certainly no surprise to any agency; all had notice stretching back to the April 1976 Guidelines that the Secretary considered Section 7 to apply to agency actions which may affect species in foreign countries.[13]

This regulatory action laid a gloss of known regulation over the language of the original Section 7. When Congress made major revisions to Section 7 in 1978, it intended to restate existing law on Section 7 consultations, including the 1978 rule. The Conference Report on the 1978 Amendments, issued October 15, 1978, explained the

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[13] After the 1978 rule had become final, the Department of the Interior continued to put forth detailed arguments supporting its view that Section 7 governed agency actions affecting listed species abroad. On April 28, 1978, the Department of State wrote to the Fish and Wildlife Service, objecting to the scope of the Section 7 consultation provisions under the 1978 rule. J.A. at 187. Interior replied with a lengthy memorandum noting the presumption against extraterritorial application of statutes but finding that,

> The Endangered Species Act was premised upon the recognition that the earth's populations of fish and wildlife are international resources requiring multilateral cooperation for their preservation. Since the abandonment of the parochial "native species only" approach of the first Endangered Species Act, Pub. L. No. 89-669, 80 Stat. 926, the endangered species legislation of this country consistently has reflected an active Congressional concern for conserving fish and wildlife on a world-wide basis. . . .
>
> The jeopardy prohibition of Section 7 is equally sweeping in its intentions . . . . By its terms, the jeopardy clause applies to all Federal agencies. There is no exception for agencies involved in foreign countries. Also by its terms, the jeopardy clause applies to all species listed under the Act. There is no exception for foreign species, and most of the animals listed as endangered or threatened are in fact foreign animals.

J.A. at 167-68.

adoption of the current version of Section 7(a) in the following terms:

> The conferees adopted Senate language [in S. 2899, 95th Cong., 2d Sess. (1978)] creating a new section 7(a), which essentially restates section 7 of existing law, and outlines the responsibilities of the Secretary and other Federal agencies for protecting endangered species. . . . *The Conferees felt that the Senate provision by retaining existing law, was preferable since regulations governing section 7 are now familiar to most Federal agencies* and have received substantial judicial interpretation.

H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978) (emphasis added). The district court, Chief Judge Alsop, found this statement in the Conference Report to be, "the one piece of legislative history helpful to the resolution of the present controversy." 707 F. Supp. at 1085.[14]

Under rules of statutory interpretation, the inescapable conclusion is that the 1978 rule correctly interpreted congressional intent on the application of Section 7:

> Where reenactment of a statute includes a contemporaneous and practical interpretation [e.g., an administrative rule], the practical interpretation is accorded greater weight than it ordinarily receives, as it is regarded as presumptively the correct interpretation of the law. . . .
>
> This rule is based upon the theory that the legislature is familiar with the contemporaneous interpretation of a statute, especially when made by an administrative body or executive officers charged with the duty of administering or enforcing that statute.

2A N. Singer, *Sutherland Statutory Construction* § 49.09 at 400 (Sands 4th ed. 1984). *See also Hartley v. Com-*

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[14] Next to the statute, the Conference Report is the most authoritative source of congressional intent. *See, e.g., Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981).

missioner, 295 U.S. 216 (1935) (upon reenactment of a statute, an administrative interpretation of a provision therein has the force of law).

In this context, it is crucial to remember that when Congress passed the 1978 amendments, the State Department and other agencies had already made known to Interior their objections to the application of Section 7 to agency actions which may affect species abroad. *Compare* J.A. at 187 and 164. By approving the 1978 rule in the Conference Report, Congress took sides in a known dispute between Interior and State, and came down firmly in favor of Interior's position, embodied in the 1978 rule.

Upon careful review of the administrative process leading to the 1978 rule, the court of appeals concluded:

> In light of the extensive commentary made by numerous agencies on the issue . . . we believe that it is highly unlikely that Congress was unaware of this statute and the law.

911 F.2d at 124. Simply reading the 1978 regulation would immediately confirm that it applied to federal actions overseas.

D. The Critical Habitat Designation Clause Of Section 4 Does Not Demonstrate A Domestic Intent For Section 7 Consultations

Whether or not critical habitat should theoretically be designated in foreign countries has no bearing on this case, and is not part of it. The issues of critical habitat designation and consultation are statutorily distinct. The Secretary's discussion of critical habitat ignores Section 4, the section of the Act under which critical habitat is actually designated (not Section 7, as the Secretary would have the Court believe). Under Section 4(b)(1)(A), 16 U.S.C. § 1533(b)(1)(A), the Secretary is to list species as endangered or threatened, "solely on the basis of the best scientific and commercial data available to him . . . ." The statute creates a different, looser, standard in Sec-

tion 4(b)(2), 16 U.S.C. § 1533(b)(2), for critical habitat designation, wherein "economic impact[s], and any other relevant impact[s]," of designating an area as critical habitat may be considered.

Because critical habitat designation and species listing occur under different statutory standards in Section 4, the issue of whether or not the Secretary should designate critical habitat abroad is analytically distinct from the issue in this case, the scope of the Section 7 consultation requirement. In the past, the Secretary has recognized this distinction. *See* J.A. at 181.

E. Applying Section 7 To Agency Actions That May Affect Listed Species Overseas Does Not Infringe Foreign Sovereignty

The Secretary argues repeatedly that Congress couldn't really have meant what it said in the statute; that requiring Section 7 consultations on agency actions that may affect listed species abroad would be too great an imposition on foreign nations' sovereignty to countenance. One of the most intelligent responses to this argument was written over a dozen years ago by the Secretary's own lawyer, the Interior Solicitor, in connection with the 1978 rule. This whole controversy was aired and decided by the relevant agencies prior to Congress' amendment of the Act in 1978.

In his comments on the proposed 1978 rule, the Interior Solicitor considered the argument,

> that using the jeopardy clause [Section 7(a)(2)] to curb the overseas activities of federal agencies would infringe on the sovereignty of foreign countries by imposing on them the environmental policies of the United States . . . .

The Solicitor responded:

> With regard to infringing on foreign sovereignty, section 7's jeopardy clause is no greater imposition of U.S. environmental policy than section 9's prohibitions [16 U.S.C. § 1538], or than section 11's provi-

> sion for forfeiting foreign species and products if they are seized by U.S. agents. *It should be remembered that the jeopardy clause actually applies only to U.S. agencies* . . . .

J.A. at 185 (emphasis added).[15]

When looking at the plain language of Sections 4 and 7(a) of the Act, it is important to remember that the question of applying Section 7 consultation requirements to federal agency actions that may affect listed species in another country is not a typical extraterritoriality problem. Application of Section 7 to such agency actions will have no impact on the sovereign powers of foreign governments or their exercise of those powers. The direct impact of applying Section 7 to agency actions affecting species overseas will be on the planning processes of United States agencies, which occur primarily in this country.

Indeed, U.S. overseas development agencies regularly conduct environmental studies in connection with their overseas activities that are more burdensome than the Section 7 consultation at issue here. AID, for example, has codified extensive Environmental Procedures. *See* 22 C.F.R. Part 216. For certain listed types of projects, see 22 C.F.R. § 216.2(d), or when AID determines through preliminary review that an action it proposes to take will have a significant effect on the environment, AID prepares an Environmental Impact Statement. AID's rules

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[15] To the extent that genuine national security concerns are at stake in a given situation, the Endangered Species Act contains an explicit national security exemption from the Section 7 process. *See* 16 U.S.C. § 1536(j). If special speed or flexibility are needed in the consultation process to meet identified foreign affairs concerns, AID or other appropriate action agencies can apply to the Fish and Wildlife Service to draft counterpart Section 7 regulations addressing such specific concerns. *See* 50 C.F.R. § 402.04; *see also* 43 Fed. Reg. at 871 (1978). In this manner the concerns expressed in foreign affairs cases such as *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), and *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), can be avoided.

provide that the EIS is, "a specific document having a definite format and content, as provided in NEPA and the CEQ Regulations." 22 C.F.R. § 216.1(c)(5). In essence AID complies with the National Environmental Policy Act in its actions abroad without interfering with foreign sovereignty or foreign policy. It can just as easily comply with the Endangered Species Act.

Applying Section 7 consultations to federal agency actions that may affect listed species in other nations will not restrict the ability of foreign sovereigns to plan their own development strategies or wildlife conservation programs, and will in fact provide them with valuable scientific information.[16] The Section 7 consultation may result in the withdrawal of United States participation in some specific development project, but attaching conditions to U.S. foreign aid is within the province of Congress, and has never before been considered a legal invasion of another nation's sovereignty.[17]

The Eighth Circuit's conclusion on this issue of purported intrusion on other nations' sovereignty was well-reasoned and correct:

> We note initially that the Act is directed at the actions of federal agencies, and not at the actions of

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[16] The only comment from a foreign country noted in the extensive administrative record in this action is found in an internal FWS memo noting that Sri Lanka had requested assistance in preserving its endangered species from the Mahaweli project. J.A. at 78.

[17] For example, 22 U.S.C. § 2151q(g)(10), concerning endangered species, mandates that the AID administrator in foreign countries shall, "deny any direct or indirect assistance under this chapter for actions which significantly degrade national parks or similar protected areas or introduce exotic plants or animals into such areas." 22 U.S.C. §§ 2281-2286 outline "debt-for-nature" exchanges in which the administrator of AID is authorized to cancel foreign debt when a government makes funds available for eligible projects, defined by the AID administrator, "involving the conservation or protection of the environment in that country," or makes a, "policy commitment to take certain specified actions to ensure the restoration, protection, or sustainable use of natural resources within that country." 22 U.S.C. § 2281(1) and (2).

> sovereign nations. Congress may decide that its concern for foreign relations outweighs its concern for foreign wildlife; we, however, will not make such a decision on its behalf.

911 F.2d at 125.

F. The Presumption Against Extraterritorial Application Of Statutes Does Not Govern This Action

Extraterritoriality is the exercise of jurisdiction by a state over persons outside its territory. *Cf.* Restatement (Third) of the Foreign Relations Law of the United States § 402 (1987). The Section 7 consultation requirement only regulates United States agency actions, often carried out within the boundaries of the District of Columbia. The Section 7 consultation requirement does not attempt to regulate or control U.S. nationals or corporations residing or engaging in activities in foreign countries. Nor does consultation attempt to regulate or control the actions of foreign governments, foreign corporations or citizens of foreign countries.

The Section 7 consultation requirement is an effort by Congress to control the internal operating procedures of its government. This Court's cases involving the judicial doctrines of extraterritoriality have always involved attempted regulation of U.S. nationals or corporations in foreign countries, where foreign laws may be controlling.[18] That situation is not present here.

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[18] *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), the earliest case characterized by the Court as involving extraterritoriality, involved two U.S. corporations doing business in Latin America. *Blackmer v. United States*, 284 U.S. 421 (1931), was concerned with finding an American citizen residing in Paris in contempt of the Supreme Court of the District of Columbia for failing to respond to criminal witness subpoenas served upon him in France. In *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949), an American citizen was employed by the defendant on certain public works in which the wages in dispute arose out of work done in Iran and Iraq. *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), involved the applicability of the Lanham Act to a citizen of the United States who

Even if Section 7 consultation were to be considered extraterritorial application of a statute, the presumption of statutory construction against extraterritorial application of statutes would not govern this case. *See, e.g., Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). In *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991), this Court recently stated that, "In applying this rule of construction, we look to see whether 'language in the [relevant act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control,'" 113 L. Ed. 2d at 282 (quoting *Foley Bros.*). The Eighth Circuit properly applied this standard—it examined the Endangered Species Act and found abundant evidence that Congress intended to protect endangered species worldwide.

Furthermore, if the nature of a statute mandates extraterritorial application, there is no presumption against such an interpretation. *United States v. Mitchell*, 553 F.2d 996, 1002 (5th Cir. 1977), and cited authorities. As the Secretary admits in his answer, J.A. at 248-49, the 1986 rule denies to listed species overseas the protection under Section 7 that listed species in the United States receive. Such a construction clearly frustrates the Endangered Species Act's purpose. *See* 16 U.S.C. § 1531(b).

The *EEOC v. Arabian American Oil Co.* decision is easily distinguished from this case on the basis of congressional intent in passing the underlying statute. In enacting Title VII, and the 1964 Civil Rights Act as a whole, Congress was clearly responding to a problem conceived of almost entirely in domestic terms: formal racial segregation in the South, and pervasive private racial discrimination in American business. In contrast, as dis-

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deceptively used the trademark "Bulova" to sell watches in Mexico. Most recently, *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227, 113 L.Ed.2d 274 (1991), concerned the applicability of Title VII to employment practices of United States employers who employ United States citizens abroad.

cussed at length throughout this brief, Congress in passing the Endangered Species Act was responding to a problem explicitly international in scope: the disappearance of wildlife through man's too often thoughtless, unstudied development and exploitation.

In the Endangered Species Act, when Congress wanted to distinguish among the United States, the high seas, and foreign nations, as it did in Section 9's taking provisions, 16 U.S.C. § 1538(a)(1)(B) and (C), it did so. As Chief Judge Alsop noted:

> Section [7]'s all-inclusive language, when contrasted with the discriminatory language of section [9], cannot be considered sloppiness on the part of Congress, but, rather, intentional language expressing a concern that the consultation provisions be given effect wherever agency action took place.

707 F. Supp. at 1085. Statutory presumptions cannot overcome the clear requirements of the Endangered Species Act that all endangered and threatened species receive the same degree of protection under Section 7 from thoughtless federal agency actions that may exterminate them from the earth.

CONCLUSION

For all of the reasons stated above, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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August 1991

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, and THE HUMANE SOCIETY OF THE UNITED STATES,
Plaintiffs,

vs.

DONALD P. HODEL, as Secretary of the Interior
Defendant.

AFFIDAVIT OF DR. JOHN W. GRANDY

DISTRICT OF COLUMBIA) ss.

Dr. John W. Grandy, being duly sworn, states:

1. I am a member of The Humane Society of the United States (HSUS) and have been a member since 1981. As an officer of The HSUS and the organizational representative for this litigation, I summarize herein the organizational interest and involvement of The HSUS in this issue, as well as my own interest as a member.

2. I am the Vice President for Wildlife and Environment of The Humane Society of the United States ("Humane Society"), a nonprofit organization which is one of the organizational plaintiffs in the above-captioned suit. I have an extensive educational and professional background in wildlife research, management, and ecology.

I have a long-standing professional and personal interest in endangered and threatened species and their protection worldwide. I hold a Bachelor's Degree in forestry and wildlife management, a Master's Degree in wildlife biology, and a Ph.D. in wildlife ecology.

3. I have testified in the United States District Court for the District of Columbia as an expert witness qualified by the Court in the fields of wildlife management, ecology, and biology.

4. From 1971 to 1974, I was wildlife specialist and program coordinator for the National Parks and Conservation Association. During that time, I participated actively in the drafting and finalizing of a multilateral wildlife treaty, the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES").

5. During portions of 1974 and 1975, I served as a staff assistant to the Senior Scientist at the President's Council on Environmental Quality.

6. In addition, from 1975-1981, I was Executive Vice President of Defenders of Wildlife, Inc., a nonprofit organization concerned with the protection of wildlife.

7. I was appointed to and served as a member of two major advisory committees to the U.S. Department of the Interior: (a) the National Wildlife Refuge Study Task Force and (b) the Animal Damage Control Policy Study Advisory Committee to the Secretary of the Interior.

8. I make this affidavit of my own knowledge and, if called upon to testify, could testify to the matters herein.

9. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is a treaty adhered to by 91 nations, and is the international community's principal means of protecting species from the negative effects of international trade. I participated actively in negotiating this treaty in 1971, 1972,

and 1973. I was a member of the U.S. Delegation to the special working session of CITES in 1977, and have participated as an official Observer in CITES meetings since, and including, 1979. In these meetings since 1981, I have actively represented the goals of The Humane Society of the United States for the protection, preservation, and wise management of animals.

10. I visited the nation of Costa Rica in 1979; I visited New Delhi, India and the nation of Nepal in 1981; I visited Gaborone, Botswana in 1983; and I visited Buenos Aires, Argentina in 1985. I visited these places principally in connection with being an official Observer to meetings of the Conference of the Parties of the Convention on International Trade in Endangered Species of Wild Fauna and Flora. An additional purpose of the trips, however, was to expand my knowledge of endangered and threatened wildlife and its habitat in areas noted above. In each of these countries, I visited cities, parks, rivers, and natural areas whenever possible, and as an ornithologist and bird watcher, watched birds with the hope of adding endangered and threatened species to the list of birds I have observed in the wild.

11. I will suffer personal and professional harm, in fact, as a result of U.S.-funded development and U.S. agency actions in the above mentioned countries and surrounding areas. For example, the deforestation which will result from the Polonoroestre project funded, in part, by the United States through the World Bank, in the Amazon Basin, will directly reduce the numbers and habitat and/or migration points of endangered birds such as the Harpy eagle and the Red Siskin. In the future, I plan to revisit the above mentioned countries and study and enjoy endangered and threatened species there.

12. For more than ten years, The Humane Society of the United States has been actively involved in matters pertaining to international protection and management of wildlife through activities involving North Pacific fur

seals (Interim Convention on Conservation of North Pacific Fur seals) and whales (International Whaling Commission). The HSUS was represented at the last three meetings of the North Pacific Fur Seal Commission as a member of the U.S. Delegation, and was represented as an official observer at the last ten meetings of the International Whaling Commission.

13. The HSUS sponsors a tour of Africa for the benefit of its members and supporters. This tour, which is of high value to many members, is currently conducted only to Kenya, but has in the recent past visited both Kenya and Tanzania. The purpose of the trip is to observe and enjoy wildlife, particularly and specifically the threatened leopard, the threatened African elephant, the endangered white rhinoceros, the endangered cheetah, and their habitat. The HSUS annually evaluates the possibility of conducting tours to many areas of the world, including South America and Africa.

14. During the last year, The HSUS commissioned and funded a study by Mr. Douglas Shane entitled "Assault on Eden: Destruction of Latin America's Rain Forests" (copy attached—not for publication) to elucidate the problems occurring as a result of development in tropical rainforests. Many of the problems which Mr. Shane identified can be tied to U.S. funding of international development projects. This study will be published as part of an HSUS monograph on the subject in 1987.

15. The Humane Society of the United States is also deeply interested in the conservation and humane treatment of wild birds in foreign countries, as evidenced by our having funded an investigator in the Amazon (see affidavit of Campbell Plowden) and by an action of the program and planning committee of our board of directors on September 16, 1986, and consensus action in our executive committee on behalf of our board of directors on September 17, 1986, *to wit*: "It was the consensus The HSUS should continue to pursue and support activi-

ties to end tropical rain forest destruction." Executive Committee Meeting Minutes, September 17, 1986.

16. United States-sponsored development through direct foreign assistance, contributions by the U.S. Agency for International Development, and through U.S. contributions to international monetary institutions have substantial and significant negative impacts on wild mammals, wild birds, wild reptiles, and other animals, including endangered and threatened species.

17. The Humane Society of the United States and its members will be harmed, in fact, by the named projects, among others, by the lack of official consultation, in general, and in regard to those projects, and by the reduction and jeopardizing of endangered and threatened species, including, but not limited to those named, by those above mentioned projects and other U.S.-funded and U.S. agency actions.

/s/ John W. Grandy
JOHN W. GRANDY

Subscribed and sworn to before me this 6th day of November, 1986.

/s/ Joan P. Spade
Notary Public

(12)

No. 90-1424

Supreme Court, U.S.
FILED
OCT 3 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,
PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

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MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

We have shown in our opening brief (at 16-31) that respondents failed to satisfy bedrock Article III standing requirements. As a consequence, the court below construed Section 7(a)(2) of the Endangered Species Act (ESA) in the context of an abstract dispute over an interpretative regulation, far removed from any concrete controversy about a specific overseas project. We have also shown (Gov't Br. 31-50) that the court of appeals' holding that Section 7(a)(2) governs projects in foreign countries is contrary to the presumption against extraterritorial application of Acts of Congress, is unsupported by the text or legislative history of the ESA, and disregards principles of deference to administrative interpretation. Respondents and amici offer no persuasive defense of the standing and extraterritoriality rulings below.

I. A. Respondents' argument serves only to highlight the extent of the court of appeals' departure from set-

tled standing doctrine. They begin by misstating (Br. 18) the posture of the case and the applicable standard of review. The district court did not render any "factual findings," as respondents claim. It granted summary judgment for respondents without identifying any evidence that would support standing, because it erroneously believed that the court of appeals had *already* resolved the standing issue against the Secretary when it reversed the district court's dismissal of the complaint. Pet. App. 24a-25a. That ruling was inconsistent with *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177, 3189 (1990), and respondents do not defend it here. Furthermore, the "clearly erroneous" standard of review respondents invoke (Br. 18) would not apply even if the district court had made factual findings. A court must "look at the record on summary judgment in the light most favorable to * * * the party opposing the motion." *Poller* v. *CBS, Inc.*, 368 U.S. 464, 473 (1962); see *Lujan*, 110 S. Ct. at 3186, 3188. The record here, far from entitling *respondents* to summary judgment, required the district court to enter judgment for the Secretary on standing. See Gov't Br. 18-29.

Respondents likewise do not defend the court of appeals' holding (Pet. App. 10a-11a, 42a-44a) that they have standing based on a supposed "procedural injury" that results when an action agency fails to initiate consultation with the Secretary about a particular project, even if none of respondents' members have a "geographical nexus" to the project itself. See Pet. Br. 35 n.10. We have explained (Gov't Br. 29-30) the flaws in that reasoning, and respondents make no contention to the contrary.

B. Because respondents no longer contend that a "procedural injury" is sufficient—and because respondents do not have standing based on their own organizational interests in wildlife, *Sierra Club* v. *Morton*, 405 U.S. 727 (1972)—they were required to identify individual members who satisfy established standing criteria. Yet respondents did not show any actual or threatened injury to any of their members as a result of U.S. funding of a project abroad, much less injury that could fairly be

traced to the Secretary's regulation or that would be redressed by a court-ordered revision of that regulation.

1. In attempting to show injury-in-fact, respondents rely (Br. 18-26) on the activities of five of their members. The court of appeals relied on two of those five (Joyce Kelly and Amy Skilbred), Pet. App. 8a-9a n.2, and we have demonstrated (Gov't Br. 19-23) that it erred in doing so. The court of appeals itself held that a third member lacked standing, and the remaining two had such a remote connection to overseas projects that the court below did not even bother to mention them.

Joyce Kelly. Respondents did not show that Kelly suffered any injury that could be traced to assistance rendered by the Bureau of Reclamation to the Aswan Dam project, which involved rehabilitation of turbines. Respondents state (Br. 22) that the project will "affect" the habitat of the Nile crocodile, including the (unspecified) area Kelly visited in 1986. But they do not describe any impact on the crocodiles, and they simply cite Kelly's affidavit, which did no more than assert that she would "suffer harm" because of the project (J.A. 101), without specifying how. In fact, Kelly's knowledge of the project apparently derived entirely from the Bureau's publication *Water for the World*, which does not suggest that it would have any effect on crocodiles or their habitat. J.A. 65. Thus, Kelly's affidavit plainly was insufficient under *Lujan*, 110 S. Ct. at 3189, to survive the Secretary's motion for summary judgment.

Amy Skilbred. Skilbred visited the vicinity of the Mahaweli Project in Sri Lanka in 1981-1982, well before she joined Defenders. Respondents do not dispute our submission (Gov't Br. 21) that Skilbred failed to link her generalized concerns about the project to animals in the particular area she visited (which she did not identify) or in the particular project unit that was to receive funds from the Agency for International Development (AID). Instead, respondents rely (Br. 23) on a 1986 article in Defenders' own magazine (J.A. 95) for the proposition that the project will harm certain species. Putting to one

side the self-serving and unsworn nature of this source (see Fed. R. Civ. P. 56(e)), the article likewise fails to link any such harm to particular areas.

Moreover, although respondents quote (Br. 23) a passage in a 1980 letter from the Fish and Wildlife Service (FWS) to AID stating that the Mahaweli Project "could have" massive environmental impacts (J.A. 215), they fail to note that the same letter acknowledged that AID had funded an environmental assessment for the entire project, furnished technical assistance to the Sri Lankan Government on endangered species and other environmental matters, and consulted with FWS in doing so. J.A. 215-216; see also J.A. 78-80, 210-216. FWS also stated that the project "could be a showcase to developing nations on how to develop their potential resources with minimum impact to the environment and wildlife," J.A. 216, and AID worked with Sri Lanka to establish new nature reserves and protect species in the area and was commended by the World Wildlife Fund for doing so. Gov't Br. 22 n.12. In light of these mitigation measures taken years earlier in consultation with FWS, there is no support for the presumption the court of appeals implicitly indulged (contrary to *Lujan*, 110 S. Ct. at 3189) that still further consultation with FWS would have some incremental effect on the project or animals.

Finally, respondents note (Br. 22) Skilbred's visit to a World Bank-funded project in Brazil. But, as both courts below correctly held (Pet. App. 44a, 61a n.6), the World Bank is not a "federal agency" whose actions are governed by domestic U.S. laws like the ESA; it is an international organization, established by international agreement.[1]

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[1] See Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, T.I.A.S. 1502; 22 U.S.C. 286 *et seq.*; *Mendaro* v. *World Bank*, 717 F.2d 610 (D.C. Cir. 1983). Respondents concede (Br. 20 n.3) that the World Bank is not a federal agency as such. But since the ESA defines "federal agency" to mean "any department, agency, or instrumentality of the United States," 16 U.S.C. 1532(7), they erroneously contend (Br. 20 n.3) that the World Bank is an "instrumentality" of the

J. Campbell Plowden. Not even the court of appeals found Plowden's testimony sufficient to support standing; this is hardly surprising, since Plowden "came only within several hundred miles" of the AID-assisted Picchis-Palcazu Project in Peru. Pet. App. 9a n.2; Gov't Br. 7 n.2. Respondents contend (Br. 27-28) that Plowden nonetheless has standing because the place he visited in 1986 is in the same "ecosystem" as the project. This expansive theory of standing is contrary to *Lujan*, which requires a plaintiff to show that he uses the specific location where the challenged conduct (or resulting injury) will occur. Moreover, respondents' "ecosystem nexus" theory would uncouple standing from injury-in-fact and would open the courts to suits by plaintiffs who neither viewed any animals nor used any habitat affected by a project. A statute purporting to allow suits on such a basis would breach Article III's fundamental case-or-controversy limitation, and there is no indication that the ESA was meant to do so.[2]

United States because some of its funds are furnished by the United States. The World Bank is not like a domestic government corporation (compare 5 U.S.C. 103); the United States owns less than 20% of its stock and cannot control its decisions. As a result, the Bank is no more an instrumentality of the United States than it is of any other member nation. The Bank's status, and the inapplicability of the ESA, are confirmed by the very statutory provisions respondents cite (Br. 21 n.3), which require the Secretary of the Treasury to instruct the U.S. directors to "urge" the management and other directors of the Bank to assess environmental impacts and "promote" environmental protection. 22 U.S.C. 262m *et seq.*

[2] Contrary to respondents' contention (Br. 27), the fact that the introductory section of the Act expresses a general purpose to conserve the ecosystems on which endangered and threatened species depend (see 16 U.S.C. 1531(b)) does not suggest that Congress intended to confer a private right of action on every individual who might live in or visit an ecosystem. Respondents quote (Br. 27-28) Plowden's testimony that the Picchis-Palcazu Project "could have" an effect on the population of certain species in the area he visited in 1986, because a reduction of the population in a contiguous area reduces the overall gene pool and makes the species more vulnerable to catastrophic events. But see Gov't Br. 22-23 n.12. Such speculation cannot establish standing, especially at the summary judg-

John Grandy. The courts below properly declined to rely on Grandy's activities. See Resp. Br. 24-25. Grandy was unable to describe a single U.S. project in any foreign country, let alone show that any such project had impaired his ability to view wildlife. J.A. 263-267. The most he could say was that "the United States Government contributes money to a lot of things in Kenya," a country he visited. J.A. 265-266.

H. Elliott McClure. Respondents concede (Br. 28-29) that McClure has no geographic nexus to any relevant project. Moreover, aside from two World Bank-funded dams that would not be subject to Section 7 in any event (see page 4, *supra*), respondents rely (Br. 20-21) solely on McClure's reference to a project proposed by the Bureau of Reclamation for the Lower Mekong River Basin in Thailand and Laos. But McClure did not exhibit any personal knowledge of the proposal. Rather, he had read about it in the Bureau's publication *Water for the World* and simply asserted, without citation to supporting evidence, that it would harm endangered wildlife. J.A. 121, 286-287. As the district court recognized (Pet. App. 61a), *Water for the World* stated only that the Bureau had helped develop a plan for such a project; it did not describe the plan, the project's impact on wildlife, possible mitigation measures, the likelihood of construction, or sources of funding. J.A. 63. There accordingly is no basis for finding any harm to listed species from the Bureau's efforts.[3]

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ment stage. See *Lujan*, 110 S. Ct. at 3189 (distinguishing *United States* v. *SCRAP*, 412 U.S. 669 (1973)). *A fortiori* there is no merit to the even more sweeping submission by amicus American Institute of Biological Sciences (Br. 4-12, 16, 19) that "all persons" have standing to sue to compel compliance with Section 7's consultation requirements with respect to a project located anywhere in the world (without any need to show injury from the project or actual harm to a listed species), on the premise that the ESA recognizes that "everyone" has an interest in "global biodiversity."

[3] Respondents contend (Br. 28-29) that McClure has standing on an "animal nexus" theory, in view of his lifelong study of endangered birds in Southeast Asia. See J.A. 120, 281-282, 285-286.

2. For the foregoing reasons, respondents failed to prove that any of the five members featured in their brief was injured in his or her ability to observe endangered or threatened species as a result of U.S. assistance to a project in a foreign country. That defect alone required summary judgment for the Secretary on standing. But in addition, respondents brought this suit to challenge not the construction of a foreign project, but the Secretary's interpretative regulation. Respondents argue (Br. 30)

McClure's study of birds would not afford him standing here even on that novel theory, because he specifically mentioned only elephants and tigers in connection with the Lower Mekong project. Moreover, although McClure's past study may increase the *intensity* of his personal interest in endangered birds, it does not give him an interest that is different in kind from that of any other member of the public who has an interest in wildlife elsewhere in the world. *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-486 (1982).

For the same reason, respondents err in relying (Br. 29) on an equally novel "vocational nexus" theory, based on the professional work of McClure and others in studying endangered species. The ESA protects certain species of plants and animals for the common benefit; it does not confer any special rights on persons who happen to study them for a living. Cf. *Lujan*, 110 S. Ct. at 3186. Those who travel to a particular area to observe a particular species, whether vocationally or avocationally, have an equal claim of standing. And persons who do not do so are equally without a basis for standing. *Rust* v. *Sullivan*, 111 S. Ct. 1759 (1991), on which respondents rely (Br. 29), was wholly different. There, the challenged regulations directly restricted employees of Title X grantees in performing their jobs, while here the challenged regulation allegedly would affect matters external to the workplace—in the world at large—and would have at most an indirect effect on the members' jobs. Compare *Diamond* v. *Charles*, 476 U.S. 54, 65-67 (1986).

Japan Whaling Ass'n v. *American Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986), did not relax standing principles in cases involving animals. Indeed, by quoting the Court's reference to "whale watching," respondents apparently acknowledge (Br. 28) that standing in a case such as this must depend on actual viewing of the affected animals. Although the Court also referred in *Japan Whaling* to the "studying" of whales by members of the plaintiff environmental organizations, there is no indication that the Court intended to recognize standing on the part of individuals whose "studying" does not involve actual observations.

that the regulation "foreclosed the possibility of Section 7 consultations" on the projects discussed above. That argument ignores the point, made in our opening brief (at 25), that their members' visits to the general vicinity of specified projects occurred (if at all) *before* the regulation even went into effect.

Moreover, as we have explained (Gov't Br. 23), even proven instances of past harm would not alone entitle respondents to prospective relief. Apparently recognizing this, respondents suggest (Br. 22, 24, 25) that their members might return to the countries they once visited. But that prospect, and the possibility they would suffer injury if they did return, are entirely speculative on the present record. For example, although Kelly said she intended to return to Egypt, she did not say when or explain how rehabilitation of Aswan Dam turbines would affect her ability to observe crocodiles in the future, any more than in the past. J.A. 101; Gov't Br. 20. Skilbred had not returned to Sri Lanka between the time of her trip in 1981-1982 and her deposition in December 1988. Although respondents contend that Skilbred expressed a "fixed intention" to return (Br. 24), the testimony they cite contains only the vague statement that she "intend[ed] to visit areas where U.S. projects may be taking place sometime in the future," including "[t]he Mahaweli area" (J.A. 320-321; see also J.A. 144, 145); and Skilbred also testified that she did *not* know when she would return, except that it would not be in the next year because of civil war in Sri Lanka. J.A. 318. For the remaining three of respondents' members, the prospect of future harm was even more speculative.[4]

[4] McClure testified that he had no plans to travel to Thailand again, in light of his age and financial status. J.A. 286. Grandy testified that he intended to go back to Kenya in 1989 and would "look for" development projects there and "find out who funds them," and that he intended to return to Botswana but planned to visit only a World Bank project. J.A. 266-277. Plowden testified that he "would like to visit" the Picchis-Palcazu Project "in the future," but he did not have plans to do so; he stated only that he was planning to go back to the Amazon the next year, and that

We do not argue that, as respondents put it (Br. 26 n.6), their members must "constantly camp out at a project site to possess standing." But under this Court's cases, respondents must show that future visits by their members are sufficiently imminent and definite—and that U.S.-assisted projects are sufficiently likely to harm their ability to view endangered species at project sites—that whatever injury they claim is "certainly impending," *Whitmore* v. *Arkansas*, 110 S. Ct. 1717, 1723, 1725 (1990), or "real and immediate," *Los Angeles* v. *Lyons*, 461 U.S. 95, 102-103 (1983). Respondents do not suggest that they satisfied this test.

3. Respondents also do not come to grips with the fact that any future injury to their members' ability to view endangered species in a foreign country could not be fairly traced to the Secretary's interpretative regulation. Other federal agencies are not bound by the Secretary's view of the geographic reach of Section 7(a)(2).[5] It therefore is not surprising that respondents do not cite a single instance while the pre-1986 regulation was in effect in which an action agency felt compelled to follow the Secretary's initial interpretation that Section 7(a)(2)

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he would also visit the project "if possible." J.A. 295. Moreover, Plowden testified to his understanding that all AID funding for the project had already terminated (C.A. App. 123-125); and as we have explained (Gov't Br. 7 n.2), AID's field activity on the project in fact *had* ceased by 1988, and its participation ceased altogether in 1990. See Exh. 1 to Mem. in Support of Def's Cross Mot. for Sum. Judgment.

[5] Respondents mischaracterize (Br. 33 n.9) our argument to be that "federal action agencies could simply ignore the results of a Section 7 consultation." The Secretary fully recognizes that where consultation is required, an agency may not ignore the results. On the other hand, the statutory text makes plain that the obligation under Section 7(a)(2) to avoid jeopardy to listed species falls on the action agency, which is ultimately responsible for deciding what is required by that Section, including whether to consult with the Secretary about a particular project, at home or abroad. As one of respondents' principal witnesses, John Grandy, acknowledged (J.A. 267-268), the Secretary has no authority to order another agency to initiate consultation. See Gov't Br. 25.

applied to projects in other countries. There accordingly is no reason to believe that future projects would be affected by a district court order requiring the Secretary to revert to that earlier interpretation.[6]

Moreover, respondents concede (Br. 47) that "[a]pplying Section 7 consultations to federal agency actions that may affect listed species in other nations will not restrict the ability of foreign sovereigns to plan their own development strategies." Yet they fail to explain how any harm that might result to endangered species if a foreign sovereign does proceed could nonetheless fairly be traced to the Secretary's regulation. Nor do they explain how a U.S. court could afford relief that would redress any adverse effects of projects carried out by foreign governments in those circumstances. Respondents thus ignore

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[6] In a belated attempt to show redressability, respondents express confidence (Br. 34) that if this Court affirms the judgment below, action agencies will consult with FWS under Section 7(a)(2) about foreign projects. This argument is pure bootstrap. If this Court reaches the merits and affirms, other federal agencies will have little choice but to follow its holding. But they would do so because of the precedential effect and practical finality of this Court's rulings on legal issues, not because of any res judicata effect of the judgment, since only the Secretary is a party. Cf. 5 U.S.C. 702 (United States may be named as a party, but an injunctive order must specify the federal officers who are responsible for compliance). Redressability therefore must be analyzed as of the time respondents filed suit and focus on whether a district court order would bind action agencies.

Of course, action agencies may voluntarily consult with FWS on overseas project, as AID did on an informal basis for the Mahaweli Project. J.A. 78-80, 210-213. While respondents cite (Br. 33-34) that voluntary consultation in an effort to show redressability, it in fact undercuts their assumption that the 1986 regulation will cause agencies to overlook harm to endangered species in planning overseas projects. FWS's willingness to assist action agencies in evaluating overseas projects also exposes the error in respondents' attempt (Br. 31) to justify their decision to sue the Secretary, rather than action agencies, on the ground that the Secretary "refuses to consult" with other agencies.

critical breaks in the chains of causation and redressability that are necessary for their standing. Gov't Br. 26-28.[7]

C. Finally, respondents argue (Br. 16-17, 30) that established standing requirements should be relaxed here. Specifically, respondents contend that the ESA defines a risk of harm to an endangered species as an "injury" to respondents, and gives them standing to sue. While it may be true that a risk of adverse effect triggers an agency's duty to initiate consultation with FWS under Section 7(a)(2), respondents' argument begs the question of *who* may sue over a failure to consult. It would be quite odd to recognize a risk to animals as an actual injury to a human plaintiff, much less to plaintiffs with the attenuated connection to the animals that respond-

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[7] Amici Texas, *et al.*, contend (Br. 15-16) that the causation and redressability issues should be ignored insofar as the actions of foreign governments are concerned because the Court held that the APA afforded the plaintiffs in *Japan Whaling* a cause of action. 478 U.S. at 231 n.4. There, the plaintiffs challenged the Secretary of Commerce's failure to certify that Japanese whalers were engaging in conduct that diminished the effectiveness of a convention, which would have triggered a reduction of at least 50% in Japan's fishery allocation within the United States. *Id.* at 226. The Court did not mention the causation and redressability elements of standing; it addressed only the text of the APA. Although the government referred in passing to those elements of standing in a footnote in its reply brief in *Japan Whaling* (at 17-18 n.20), stating that the uncertainty about Japan's response made the plaintiffs' standing "dubious," the government did not separately press a standing argument. *Japan Whaling* therefore should not be understood to have dispensed, *sub silentio*, with the causation and redressability elements of standing in this setting (*Hagans* v. *Lavine*, 415 U.S. 528, 535 n.5 (1974); *United States* v. *Verdugo-Urquidez*, 110 S. Ct. 1056, 1064-1065 (1990)), especially since those elements have been repeatedly reaffirmed since *Japan Whaling*. See Gov't Br. 17. Moreover, *Japan Whaling* involved affirmative sanctions that were enacted for the specific purpose and with the firm expectation of causing a foreign sovereign to adhere to restrictions on whaling. 478 U.S. at 225-226. The ESA contains no comparable determination by Congress of the likely effect on a foreign sovereign of withholding assistance. Compare *Allen* v. *Wright*, 468 U.S. 737, 756-761 (1984). Accordingly, in order to find that respondents have standing, the Court itself would have to assess the likely response of foreign governments in this diplomatically sensitive area. See Gov't Br. 27.

ents claim here. Nothing in the ESA suggests that Congress purported to adopt that bizarre view of injury, and thereby greatly expand the class of potential plaintiffs beyond the normal strictures of Article III. The entire focus of Section 7(a)(2) is on protection for listed species, not the interests of human beings. See Gov't Br. 28.[8] Similarly, nothing in the ESA's citizen-suit provision, which permits "any person" to sue in certain circumstances, 16 U.S.C. 1540(g)(1), purports to create a legal right, "the invasion of which creates standing." See *Valley Forge*, 454 U.S. at 488 n.24 (APA provision permitting any person aggrieved by agency action to sue does not create legal rights).[9]

In any event, respondents' argument overlooks that what is challenged here is not an action agency's failure to consult, but the Secretary's interpretative regulation. Congress plainly did not define an allegedly erroneous interpretation in an advisory regulation as "injury" that would confer standing on respondents to challenge it, divorced from any concrete claim of harm.[10]

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[8] *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982), relied upon by respondents (Br. 16-17), involved a statute that created a personal right to truthful information about available housing. Section 7(a)(2) consultation, by contrast, is not directed at providing information to members of the public, since it occurs between agencies without any requirement for public input.

[9] We have shown (Gov't Br. 29 n.18) that the citizen suit provision does not cover this case, because the Secretary's interpretation, even if erroneous, is not a "violation" of the Act within the meaning of 16 U.S.C. 1540(g)(1)(A). Respondents suggest (Br. 8) that the 1986 regulation can be challenged under 16 U.S.C. 1540(g)(1)(C), which applies when "there is alleged a failure of the Secretary to perform any act or duty under Section 4 of this title which is not discretionary." This case, however, arises under Section 7, not Section 4. But even if the citizen suit provision did cover this suit, such a provision cannot, as respondents acknowledge (Br. 17-18), relax constitutional standing requirements. See *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981).

[10] Respondents rely (Br. 18) on a statement in *Lujan*, 110 S. Ct. at 3190, that "[s]ome statutes permit broad regulations to serve as

II. We have shown (Gov't Br. 31-50) that the court of appeals' holding on the merits contravenes the established presumption that Acts of Congress do not apply overseas, absent clearly expressed legislative intention to the contrary. *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991). Respondents, like the court below, do not point to any plain statement in the statutory text or legislative history that Section 7(a)(2) applies to actions in foreign countries. In fact, Section 7(a)(2), and Section 7 as a whole, have a domestic focus. Respondents rely on inferences drawn from other provisions of the ESA and statements in the legislative history that do not pertain to Section 7. Those materials are wholly insufficient to overcome the presumption against extraterritoriality and indeed underscore the domestic focus of Section 7(a)(2). Moreover, significant adverse consequences would follow from application of Section 7's rigid standards and ill-suited procedures overseas, where the project, territory, natural resources, and affected species are all under the primary jurisdiction and laws of a foreign government. Gov't Br. 31-33. For these reasons, the Secretary's interpretation of Section 7(a)(2) not to apply in foreign countries is, at the very least, reasonable, and should be sustained under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

A. Respondents fail to acknowledge that the text of Section 7(a)(2) itself has a domestic focus, since it refers to "affected States" but not foreign countries. Indeed, respondents do not contest that their position requires the surprising conclusion that Congress, without saying so, gave a vastly different geographic reach to two different parts of a single sentence, by confining its protection for critical habitat to the United States but extending its protection for species that depend on such habitat to foreign countries. Gov't Br. 36-37. Instead,

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the 'agency action,' and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt." But the ESA, unlike some statutes, does not authorize immediate challenges to regulations. Compare 33 U.S.C. 1369(b); 42 U.S.C. 7607(b).

respondents attempt to support this unusual interpretation (Br. 44-45) on the ground that under a different provision of the Act, Section 4, critical habitat is designated using somewhat different standards than those that apply to listing of species. See 16 U.S.C. 1533(b)(1)(A) and (2). But this difference is entirely irrelevant to application of the Section 7(a)(2) duty, which applies to both the species and its critical habitat.

Respondents contend (Br. 36), however, that the references in Section 7(a)(2) to "any action" and "any endangered species" indicate an intent to apply it to projects in foreign countries. Even the court below recognized that the mere use of such a general term as "any" is insufficient to extend a statute's coverage abroad. Pet. App. 12a-13a; see *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949). That is especially so here, since any such inference is negated by Section 7(a)(2)'s reference to "affected States."

Contrary to respondents' contention (Br. 4, 36), the fact that Section 4 provides for listing of endangered or threatened species whose habitat is in foreign countries has no bearing on the scope of Section 7(a)(2). Those listings are necessary for administration of the ESA's distinct prohibitions against trading in listed species—prohibitions that, unlike Section 7(a)(2), have an *express* extraterritorial reach. See page 16, *infra*. Moreover, respondents' reliance on a supposed linkage between Section 4 and Section 7(a)(2)'s reference to "any endangered species" overlooks that this case turns on the meaning of the phrase "any action" (which respondents contend includes "action[s]" abroad), not "any endangered species." See Gov't Br. 35 n.23. While a species whose normal range is outside the United States may be protected from the effects of a domestic project, that unremarkable consequence of domestic regulation does not imply that projects that are themselves outside the United States are covered by Section 7. For that result to obtain, some clear statement of congressional purpose to extend its standards to overseas projects is required, and none has been identified. To the contrary, Section

7(a)(2) requires an agency to "insure" that "any action" it authorizes, funds, or carries out will not be likely to jeopardize a listed species, yet an agency of the United States Government cannot "insure" that result for a project undertaken by a foreign government within its own borders. See Gov't Br. 36 n.24.[11]

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[11] We also have shown (Gov't Br. 37-39) that the domestic focus of Section 7(a)(2) is confirmed by the structure of Section 7 as a whole, which provides, under amendments adopted in 1978, for exemptions from Section 7(a)(2) under standards that themselves have a domestic focus. Contrary to respondents' contention (Br. 37-38), the references in the exemption provisions to the Governor of the State, "if any," where an agency action will occur (16 U.S.C. 1536(g)(1) and (2)(B)), and the provision for judicial review of exemption decisions concerning actions "outside of any circuit" (16 U.S.C. 1536(n)), do not imply that projects in foreign countries are covered. Rather, they suggest coverage of actions on the Outer Continental Shelf and the high seas, which would not be subject to foreign laws and governmental authority. See Gov't Br. 38 n.28. Moreover, *Arabian American Oil* makes clear that an inference drawn from language such as this falls far short of the clear statement necessary to overcome the presumption against extending U.S. laws into foreign countries. 111 S. Ct. at 1233-1234.

The Zoological Parks amici claim (Br. 24-26) that it is illogical for the Secretary to interpret Section 7(a)(2) to apply on the high seas but not in foreign countries. Of course, coverage of the high seas is not at issue here. In any event, this contention overlooks Section 7(o) of the Act, 16 U.S.C. 1536(o), which provides that certain actions permitted by Section 7's exemption or incidental-taking provisions (16 U.S.C. 1536(b)(4)(iv) and (h)) shall not constitute prohibited "takings" of protected species, "notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C)." Subsection 1538(a)(1)(C) contains the prohibition against taking endangered species "upon the high seas." Thus, Section 7 contemplates coverage of at least some actions on the high seas. Compare *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 440-441 (1989). Section 7 contains no similar reference to activities in foreign countries. Indeed, it is significant that the prohibition in 16 U.S.C. 1538(a)(1) against the taking of protected species by persons subject to U.S. jurisdiction applies on the high seas but *not* in foreign countries. This reinforces the conclusion that Congress drew the same line in Section 7(a)(2).

Amici also overlook that the United States has sovereign rights in various marine species on the high seas even beyond its terri-

B. As respondents note (Br. 3-4, 37), the ESA reflects concern about wildlife worldwide. But that scarcely suggests that every provision of the Act applies worldwide. To the contrary, as we have explained (Gov't Br. 39-41), the Act makes clear that Congress intended to address the problem of protecting species in foreign countries by the accustomed means of international agreements and cooperation, rather than unilateral extension of U.S. law onto foreign soil. And where Congress intended to depart from that approach, it expressly so provided—*e.g.*, by extending into foreign countries the prohibition against commerce in protected species by persons subject to U.S. jurisdiction. 16 U.S.C. 1532(9), 1538(a)(1)(E) and (F). The absence of any comparable expression of intent to extend the restrictions in Section 7(a)(2) into foreign countries therefore is all the more telling. It also is telling that no legislator, committee, or witness ever suggested when Section 7(a)(2) was enacted that placing statutory restrictions on the activities of foreign governments that receive assistance from the United States would be an appropriate means of responding to concerns about foreign wildlife.[12]

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torial jurisdiction. 16 U.S.C. 1811 (asserting jurisdiction over all fish within 200-mile "fishery conservation zone" and all anadromous species throughout their migratory range, except when they are within another nation's fishery conservation zone); see also Presidential Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983) (asserting various sovereign rights in 200-mile zone).

[12] Respondents cite (Br. 40) a statement by Congressman Dingell in favor of having "a management program that is going to maintain these populations around the world." However, the context shows that he was speaking not about applying Section 7 overseas, but about providing "counterpart funds" under 16 U.S.C. 1537(a), to "encourage management in other countries to keep these population levels up." *Hearings on H.R. 37 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 93d Cong., 1st Sess. 349 (1973). As we have shown (Gov't Br. 43-44), all other references in the legislative history to international aspects of species protection were in terms of encouraging cooperation and fulfilling treaty commitments, while all references to Section 7(a)(2) were limited to domestic projects. See also S.

Respondents assert (Br. 41-44) that Congress ratified the initial agency interpretation that Section 7(a)(2) applies to projects in foreign countries. But they cite no evidence that Congress was aware of the relevant provision in the 1978 regulations, much less endorsed it. Gov't Br. 45; cf. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989). The absence of any such evidence compels rejection of any ratification argument here, because only a clear statement of intent by Congress itself can overcome the presumption against extraterritorial application. Respondents' argument fails even on its own terms, however, because the exemption provisions added to Section 7 in 1978 themselves have a domestic focus. See note 11, *supra*.[13]

Rep. No. 307, 93d Cong., 1st Sess. 3 (1973) (ESA must provide protection "throughout the nation" for endangered or threatened species). There was no suggestion that fulfillment of any treaty commitments of the United States required application of the strict statutory standards in Section 7(a)(2) to projects undertaken by a foreign sovereign that receives assistance from the United States. Congress presumably would have expected such projects to be governed by the treaty commitments (and domestic laws) of the foreign sovereign.

[13] Amici City of Austin, *et al.*, rely (Br. 25-26) on statements in subsequent committee reports that, in their view, criticize the 1986 regulations for failing to interpret Section 7(a)(2) to apply in other countries. For instance, the House Appropriations Committee (which is not charged with substantive oversight of the ESA) stated: "The Committee also expects [FWS] to continue to provide consultations on endangered species to United States agencies dispensing foreign assistance." H.R. Rep. No. 714, 99th Cong., 2d Sess. 19 (1986). This passage could well refer to voluntary consultation. See note 6, *supra*. The Senate Report accompanying the Endangered Species Act Amendments of 1988, Pub. L. No. 100-478, Tit. I, 102 Stat. 2306-2307, likewise does not expressly refer to the controversy concerning extraterritorial application of Section 7(a)(2), and there is no indication that Congress as a whole was aware of that controversy when it voted on the 1988 amendments, which did not affect Section 7. Even in an ordinary case of statutory construction (not involving the presumption against extraterritoriality), the Court has cautioned that such "views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117

The contention by amici City of Austin, *et al.* (Br. 4-10) that the Secretary's interpretation will frustrate the purposes of the Act is entirely unwarranted. Amici assume (Br. 9) that if U.S. law does not apply, foreign species will go unprotected, and U.S. agencies will be "free to do whatever they please" in foreign countries. This chauvinistic view ignores the fact that other nations have their own treaty commitments and statutory regimes to protect wildlife within their borders, to which U.S.-supported projects will presumably be subject. If those commitments and regimes are deemed inadequate, the approach contemplated by the ESA is for the United States to enter into appropriate international agreements, 16 U.S.C. 1531(a)(4), or for the Secretary, "through the Secretary of State," to "encourage foreign countries to provide for the conservation of * * * endangered species," 16 U.S.C. 1537(b). See Gov't Br. 39-41, 41-42, 47.[14]

C. Amici (but not respondents) urge the Court to carve out an exception to the presumption against extraterritoriality where environmental statutes are concerned. Zoological Parks Br. 9-23; Ecotropica Br. 5-18.[15] But they

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(1980); see also *TVA* v. *Hill*, 437 U.S. 153, 192 (1978) (rejecting post hoc committee statement about ESA because "there is no indictation that Congress as a whole was aware of [it]").

[14] Similarly, the absence of a requirement for formal interagency consultation under the particular procedures of Section 7 does not imply that federal agencies will ignore the possible impact of foreign projects on listed species. See Gov't Br. 22 (describing AID environmental assessments); City of Austin Br. 1a-2a (describing USDA environmental assessment of pesticide spraying in Guatemala (discussed by amici (Br. 8)), which found no effect on endangered warbler).

[15] Respondents contend (Br. 48) that the presumption should not apply because the consultation requirement is merely "an effort by Congress to control the internal operating procedures of its government." This argument ignores the fact that consultation about an overseas project would focus not on agency operating procedures, but on whether the project itself will have an adverse effect on wildlife in the foreign country. The extraterritorial aspect of this inquiry is not diminished if the affected species migrates to the United States, since both the project that the agency would be required to analyze and its potential impacts on the environ-

cite no support for such an exception, and the cases that have considered the possible extraterritorial scope of U.S. environmental laws have uniformly recognized the applicability of the presumption. See Gov't Br. 34 n.22; see also *Environmental Defense Fund* v. *Massey*, Civ. No. 91-1068 (D.D.C. Aug. 29, 1991) (NEPA does not apply in Antarctica). Even the court below recognized that the presumption applies here. Pet. App. 19a.

Indeed, the very considerations on which amici rely weigh strongly against the exception they urge. The fact that an environmental problem abroad may affect many nations (Ecotropica Br. 16-18; Zoological Parks Br. 11-13) should make the courts all the more reluctant to extend U.S. law abroad to address it; if all nations did the same, a cacophony of regulatory standards would result. The numerous treaties amici cite (Zoological Parks Br. 13-16) show that the United States and other nations have instead chosen to address these issues through the usual method of diplomacy, with a view toward achieving consensus on either the applicable standards or the manner in which divergent standards may be respected and harmonized. As we have pointed out (Gov't Br. 48), Congress recently endorsed that approach specifically with respect to protection for threatened species and biodiversity.

Finally, the fact that Congress has on occasion departed from that approach by expressly imposing restrictions on U.S. Government activities and financial assistance abroad (Zoological Parks Br. 8) shows that Congress knows how to do so when it deems it advisable, after weighing the possible impact on relations between the United States and foreign governments and the wisdom of so limiting

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ment would occur inside the foreign country. More fundamentally, however, consultation is only an adjunct to the strict substantive duty to "insure" that actions are not likely to jeopardize listed species. If Section 7(a)(2) applies, the agency would have to withdraw from any project when it could not insure such protections inside the foreign country. *TVA* v. *Hill*, 437 U.S. at 193-195. Clearly, Section 7 does far more than "assure regularity in the practice of government," as the Zoological Parks amici contend (Br. 9).

the flexibility of the Executive's conduct of foreign affairs. Gov't Br. 31-33, 47-48; compare *Arabian American Oil*, 111 S. Ct. at 1235-1236.[16] As a result, Congress's actions in this area have conformed to the presumption against extraterritorial application of federal statutes and to the need for a clear statement to overcome that presumption. These principles "assure[] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved." *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2170 (1991). Section 7(a)(2) contains no such clear statement, and therefore furnishes no assurance that Congress has in fact faced and chosen to accept the myriad difficulties that would result from applying that Section's rigid substantive standards and elaborate procedural provisions to projects in foreign countries.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

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Solicitor
Department of the Interior

OCTOBER 1991

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[16] Respondents err in asserting (Br. 46) that their interpretation of Section 7 "will have no impact on the sovereign powers of foreign governments." As the State Department made clear in protesting the Secretary's initial interpretation, "[a]n analysis by a United States agency of the impacts on endangered and threatened species in, and policy options available to, foreign countries may be perceived by them as an unwarranted interference in matters within their jurisdiction." J.A. 189; see also *NRDC* v. *NRC*, 647 F.2d 1345, 1356 (D.C. Cir. 1981) (examining another nation's project pursuant to U.S. environmental law will likely be seen by that nation as a "disguised way of substituting United States regulatory standards for the [foreign nation's] own").

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No. 90-1424

IN THE
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OCTOBER TERM, 1990

MANUEL LUJAN, JR.,
SECRETARY OF THE INTERIOR,
Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICI CURIAE* THE WASHINGTON LEGAL FOUNDATION, THE ALLIED EDUCATIONAL FOUNDATION, THE HONORABLE ORRIN G. HATCH, UNITED STATES SENATOR, AND THE HONORABLE DAN BURTON, MEMBER OF CONGRESS, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit, public interest law and policy center based in Washington, D.C., which is dedicated to supporting the

free enterprise system and promoting the principles of judicial restraint. Current membership in the WLF is approximately 120,000 individuals and businesses nationwide. WLF advances its objectives through litigation and participation in administrative proceedings in both state and federal forums. To this end, WLF has appeared in this Court as well as other state and federal courts as *amicus curiae* in cases affecting the free enterprise system.[1] In particular, WLF is interested in promoting the certainty, predictability, and financial stability of business interests. WLF believes that these indicia of a properly-operating free enterprise system are threatened by undue judicial interference with the actions of the elected Branches of government. Accordingly, WLF has been active in this Court and other federal courts as *amicus curiae* asserting the necessity for strict adherence by the federal courts to the principle of separation of powers.[2]

The Allied Educational Foundation ("AEF") is a non-profit, charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study such as law and public policy.

The Honorable Orrin G. Hatch is a United States Senator representing the State of Utah. The Honorable Dan Burton is a Member of Congress representing the State of Indiana. As representatives of the people elected to serve in the Legislative Branch of the federal government, they have an interest in ensuring that the

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[1] *E.g., H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989); *Meese v. Keene*, 481 U.S. 465 (1987); *Fisher v. City of Berkeley*, 475 U.S. 260 (1986); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

[2] *E.g., Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177 (1990).

principle of separation of powers is observed by the Judicial Branch.

In this particular case, judicial interference with the statutory interpretation set forth in the regulation at issue here threatens to interfere with United States foreign policy and violates the principle of separation of powers. Accordingly, WLF, AEF, Senator Hatch and Congressman Burton file this brief as *amici curiae* urging reversal of the decision below.

Amici submit this brief on behalf of petitioner with the written consent of both parties.

STATEMENT OF THE CASE

In the interest of judicial economy, *amici* adopt by reference the statement of the case set forth by petitioner.

SUMMARY OF ARGUMENT

Prior to 1968, the standing requirement of a particularized injury was uniformly applied by the Court to all manner of cases. This uniform application of this traditional standing requirement was critical to restricting the federal judiciary to the limited constitutional role accorded it under the principle of separation of powers: protection of individual rights rather than the administration of public policy.

Beginning in 1968 and continuing into the early 1970s, however, the Court relaxed this traditional standing requirement. This was especially true with respect to lawsuits brought under the Administrative Procedure Act

(the "APA").[3] In particular, the Court adopted an expansive view of what would constitute under Section 10 of the APA, 5 U.S.C. § 702, the sort of injury to a plaintiff sufficient to provide standing for judicial review. Over a series of decisions, the Court articulated the position that individuals had standing to seek judicial review of executive branch actions of widespread application, merely by alleging injury to a generalized interest shared by all citizens.

The Court has since substantially returned to the traditional position that the particularized injury requirement is a necessary element of standing. None of these later cases, however, arose under the APA, and lower courts have concluded, as did the Eighth Circuit here, that, when suit is brought challenging an administration action, it is sufficient for a plaintiff to establish standing by pleading an injury that is generally shared by all citizens and not particular to the litigant.

Last term, in *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177 (1990), the Court suggested that the "expansive expression of what would suffice for § 702 review" posited by the Court in the early 1970s is no longer sufficient. *Id.* at 3189. The Court indicated that complaints about "rules of general applicability" could not serve as a basis for judicial review under the APA. *Id.* at 3190. The Court, however, did not expressly state that the traditional standing requirement of particularized injury is as fully applicable to lawsuits brought under Section 10 of the APA as to any other lawsuit. Nor did the Court expressly overrule its decisions endorsing an expansive view of standing, although the Court did leave significant doubt as to the continuing validity of those decisions. As a

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[3]Pub. L. No. 89-554, 80 Stat. 392 (codified as amended in various sections of Title 5 of the United States Code).

result, the court below treated *Lujan v. National Wildlife Fed'n* as only imposing an additional pleading requirement. 911 F.2d 117, 121 (8th Cir. 1990).

Amici contend that, even if respondents alleged with sufficient specificity a "direct injury" to its members, they lack standing to challenge the interpretive regulation at issue. Respondents' asserted injury is a generalized one, shared equally by all citizens, and therefore is not cognizable under the traditional requirement of standing that a plaintiff establish a particularized injury distinct from most other citizens.

Thus, this lawsuit epitomizes the confusion of the lower courts with respect to the applicability of the traditional standing principle of a particularized injury in the administrative law context. The failure of the lower courts to apply the requirement of a particularized injury in the administrative law context has led to an evisceration of the principle of separation of powers, resulting in "an overjudicialization of the process of self-governance."[4] The federal judiciary, rather than elected officials, continue to assume the role of unelected administrator of public policy, despite the Court's rather explicit comments in *Lujan v. National Wildlife Fed'n* that such "sweeping actions" are for the Executive and Legislative Branches and are not the "traditional . . . mode of operation" of the Judicial Branch. 110 S. Ct. at 3191.

Amici will argue that the Court should clearly articulate that the asserted injury by which a litigant claims standing to challenge an administrative action must be a particularized one which sets him or her apart from other citizens. In order to do so with unambiguous clarity, the

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[4]Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881 (1983).

Court should expressly overrule its prior decisions to the contrary. The re-establishment of the traditional understanding of the doctrine of standing is critical to ensuring that the federal judiciary is restricted to its constitutional role of protecting individual rights rather than generalized societal goals and must be applied uniformly to all lawsuits brought in the federal courts including those brought under the APA.

ARGUMENT

A. The Requirement Of A Particularized Injury Is Essential To Preserving The Principle Of Separation Of Powers.

The doctrine of standing is fundamental to the maintenance of our constitutional form of government. Its purpose is to give effect to the principle of separation of powers[5] by confining the judicial branch to the exercise of its "inherently distinct" power[6] to adjudicate the rights of individuals as presented in "cases" or "controversies."[7] Whereas the elected Branches are concerned chiefly with broad societal interests, the judiciary is concerned with individual or minority rights, including rights that may be threatened as a consequence of legislative or executive

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[5]*Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (*per curiam*) (the doctrine of standing serves as a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other").

[6]*Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982).

[7]U.S. Const. art. III, § 2.

action.[8] The doctrine of standing serves to identify the individuals or minority groups entitled to judicial protection and to ensure that such protection is available when the legally protected rights of those individuals or groups are infringed or threatened. *Allen v. Wright*, 468 U.S. 737, 750 (1984).

In *Frothingham v. Mellon*, 262 U.S. 447 (1923), the Court articulated the importance of the doctrine of standing, and especially the requirement of a particularized injury, in preserving the principle of separation of powers. In *Frothingham*, a taxpayer sought to restrain payments from the United States Treasury to several states that chose to participate in a federal program established through the Maternity Act of 1921. The plaintiff claimed that the federal government lacked power to appropriate money for the reduction of maternal and infant mortality, and that such appropriations would cause an increase in her taxes and "thereby take her property without due process of law." *Id.* at 486. The Court did not reach the merits of the claim, holding instead that neither her purported injury nor the "right" invaded was an appropriate basis on which to invoke the power of the Court. The taxpayer's "interest in the money of the treasury . . . is shared with millions of others, is comparatively minute, and indeterminable, and the effect upon future taxation . . . so remote, fluctuating and uncertain that no basis is afforded" for judicial review. *Id.* at 487.

In order to meet the standing requirement, the Court wrote:

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[8] *E.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) ("The province of the Court is, solely, to decide on the rights of individuals . . . .").

> The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.[9]

The Court in *Frothingham* concluded that unless a litigant sought to resolve a dispute that affected him *particularly*, as opposed to the public at large, the dispute was to be resolved not by the judiciary, but by the elected Branches of the government.

B. The Elimination Of The Particularized Injury Requirement Eviscerates The Principle Of Separation Of Powers.

Until 1968, the *Frothingham* requirement of particularized injury was applied uniformly by the Court in cases arising under the APA[10] as well as in other contexts.[11] In *Flast v. Cohen*, 392 U.S. 83 (1968), however, the Court seemed to sever the doctrine of standing from any role in

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[9]262 U.S. at 488.

[10]*E.g.*, *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (drug manufacturers had standing under the APA to challenge Food and Drug Administration regulations specifically directed at drug manufacturers); *American Trucking Ass'n, Inc. v. United States*, 364 U.S. 1 (1960) (granting standing under the APA to a trucking association to challenge a regulation affecting railroads due to the trucking industry's pecuniary interest as a competitor).

[11]*E.g.*, *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) (holding that "[t]he common thread underlying [standing] requirements is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation").

preserving the principle of separation of powers. In holding for the first time that a federal taxpayer had standing to challenge, on Establishment Clause grounds, federal expenditures to assist church-run schools, the Court stated:

> The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.[12]

Thus, although the taxpayer-plaintiff in *Flast* had not suffered an injury that had set him apart from all other citizens, the Court held that he could challenge the expenditure of funds at issue.

In 1970, the Court applied this new expansive view of standing to lawsuits challenging administrative action. The Court did so by "discovering" for the first time since enactment of the APA that Congress had intended Section 10 of the APA to eliminate the particularized injury

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[12]392 U.S. at 100-01.

requirement in lawsuits brought under the APA.[13] This provision of the APA provides that "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." 5 U.S.C. § 702 (1988). In *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150 (1970) ("*Data Processing*"), and *Barlow v. Collins*, 397 U.S. 159 (1970), decided on the same day, the Court interpreted Section 10 of the APA to confer standing on any complainant so long as "the interest sought to be protected by the complaint is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing*, 397 U.S. at 153. The Court also expanded the type of interests that could serve as a basis for standing to include "aesthetic, conservational, and recreational as well as economic values." *Id.* at 154 (quoting *Scenic Hudson Preservation Soc'y Conf. v. Federal Power Comm'n*, 354 F.2d 608, 616 (2d Cir. 1965)).

The Court's decisions in *Data Processing* and *Barlow* effectively reversed the previous three decades' understanding that Section 10 of the APA did not expand the ability of plaintiffs to seek review of administrative action. The Court's new interpretation of Section 10 of the APA had the effect of allowing persons to bring suit

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[13]In fact, however, the legislative history of the APA is clear that Congress intended Section 10 to reflect the then-existing law of standing and not to work any change in the traditional requirement of a particularized injury. S. Rep. No. 752, 79th Cong., 1st Sess. 44 (1945). Similarly, the Attorney General's Manual on the Administrative Procedure Act described Section 10 as "a restatement of existing law." Attorney General's Manual On The Administrative Procedure Act 96 (1947). A good review of the legislative history of Section 10 is set forth in Note, *Competitors' Standing to Challenge Administrative Action under the APA*, 104 U. Pa. L. Rev. 843, 856-60 (1956).

challenging administrative action regardless of whether they could allege a particularized injury.

Two decisions by the Court in the early 1970s unambiguously articulated the abandonment of the particularized injury requirement. In *Sierra Club v. Morton*, 405 U.S. 727 (1972), an environmental organization sued to enjoin the development of a ski area in California's Sequoia National Park. The organization averred that the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park for future generations." *Id.* at 734. The organization failed, however, to plead or allege that any of its members would be affected by the development of the ski area. *Id.* at 735. The Court regarded this pleading defect as fatal to the plaintiff's standing. The Court noted, however, that the trend of its decisions "has been toward recognizing that injuries other than economic harm are sufficient [to establish standing] and toward discarding the notion that an injury that is widely shared is *ipso facto* not an injury sufficient to provide the basis for judicial review." *Id.* at 738.

The pleading defect of *Sierra Club* was held to be remedied in *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) ("*SCRAP*"). In *SCRAP*, an association filed suit to enjoin an order by the Interstate Commerce Commission allowing railroads to collect a 2.5% rate surcharge. The basis of the association's claim was that the railroad rate surcharge would make the transportation of recyclable materials to recycling centers too costly. As a consequence, there would be less recycling, an increase in litter, and greater use of natural resources rather than recycled materials. The association's members claimed that they would be personally harmed by the resultant air pollution from an increased use of incinerators and that the local parks and

forests on which they claimed to recreate would be scarred from natural resource exploitation and garbage. *Id.* at 678.

The Court held that the association members had alleged a sufficient injury to establish standing. "[N]either the fact that the appellees here claimed only a harm to their use and enjoyment of the natural resources of the Washington area, nor the fact that all those who use those resources suffered the same harm, deprives them of standing." *Id.* at 686-87. Indeed, the Court intimated that "all who breathe the air" had standing to challenge the surcharge at issue. *Id.* at 687. As the Court stated:

> [W]e have already made it clear that standing is not to be denied simply because many people suffer the same injury. Indeed some of the cases on which we relied in *Sierra Club* demonstrated the patent fact that persons across the Nation could be adversely affected by major governmental actions. To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.

Id. at 687-88.

SCRAP, of course, ignored the fact that under the Constitution there is always redress for governmental action by petitioning the elected Branches to which the Constitution entrusted responsibility for the making of public policy affecting broad societal interests. If those Branches are not responsive to the public policy views of

the *majority*, they may be replaced through the electoral process. By embarking on the course initiated in *Flast* of reading out of the standing doctrine any concern for the principle of separation of powers, the result reached in *SCRAP* -- that the federal judiciary must be open to address public policy issues that affect most or even all citizens -- was inevitable. Thus, the federal judiciary becomes an unelected policy-making Branch of the government in derogation of the principle of separation of powers.

C. The Particularized Injury Requirement Should Be Applied Uniformly To All Manner Of Lawsuits.

One year after the *SCRAP* decision, in a case not brought under the APA, the Court initiated a return to the traditional standing requirement of a particularized injury. In *United States v. Richardson*, 418 U.S. 166 (1974), the Court refused to find that a taxpayer had standing to seek to compel the Secretary of the Treasury to publish an accounting of the receipts and expenditures of the Central Intelligence Agency. The Court stated that, although the plaintiff possessed a "genuine interest in the use of funds, . . . he has not alleged that, as a taxpayer, he is in danger of any particular concrete injury as a result" of the failure to publish such an accounting. *Id.* at 177. The plaintiff merely sought to employ a "federal court as a forum in which to air his generalized grievances about the conduct of government." *Id.* at 173 (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)).

Similarly, in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), the Court denied standing to citizens who sought to enforce the Incompatibility Clause of the Constitution[14] against Members of

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[14]U.S. Const. art. I, § 6, cl. 2.

Congress who held reserve military commissions. The Court held that plaintiffs alleged only "the abstract injury in non-observance of the Constitution. . . ." *Id.* at 223 n.13. The Court noted that the need for a distinct injury not shared by the citizenry in general is essential to standing, particularly where "the relief sought would, in practical effect, bring about conflict with two coordinate branches." *Id.* at 222.

The Court's decisions in *United States v. Richardson* and *Schlesinger v. Reservists Committee to Stop the War* can be viewed as restoring the particularized injury requirement of *Frothingham* and limiting *Flast* to its strict facts.[15] This is confirmed by the fact that both decisions quote the following passage from *Ex Parte Levitt*, 302 U.S. 633 (1937).

> It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.

Id. at 634.

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[15]*See also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 463 (1982) (holding that taxpayers do not have standing to challenge an incidental disposition of government property by an executive officer as inconsistent with the Establishment Clause).

The Court repeatedly reaffirmed the particularized injury requirement during the late 1970s, disavowing the *dictum* of *Flast* that the doctrine of standing "does not, by its own force, raise separation of powers problems," *Flast*, 392 U.S. at 100, and taking the position that the requirement of standing "is founded in concern about the proper -- and properly limited -- role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Throughout the 1980s, the Court continued to articulate explicitly the intimate relationship between the doctrine of standing and the Constitution's principle of separation of powers.[16]

During this time, however, the Court did not have the opportunity to revisit the doctrine of standing in the context of the APA. Although there is no principled explanation for a more relaxed standing requirement under the APA, the lower courts continued to rely upon the decisions in *Data Processing*, *Sierra Club* and *SCRAP* to find standing in lawsuits brought under Section 10 of the APA that alleged only generalized grievances shared broadly by most citizens. The result, as with the instant case, was to substitute the federal judiciary as public-policy makers in the place of legislators and executive officers in derogation of the principle of separation of powers.

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[16]*E.g.*, *Allen v. Wright*, 468 U.S. 737, 738 (1984) (holding that parents of black school children did not have standing to challenge a decision by the Internal Revenue Service to confer tax-exempt status on allegedly racially discriminatory private schools because their children were not denied equal treatment by the challenged discriminatory conduct); *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (holding that "federal court[s] may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional").

Last term, however, in *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177 (1990), the Court considered the contours of the doctrine of standing under the APA for the first time since *SCRAP*. In *Lujan v. National Wildlife Fed'n*, an environmental organization sought judicial review under Section 10 of the APA of the administration by the Bureau of Land Management of its "land withdrawal review program." In order to establish standing, the National Wildlife Federation ("NWF") principally relied upon the affidavits of two members who claimed to have recreated "in the vicinity" of parcels of land included within the program. With respect to this assertion, the Court found that the affidavits lacked the requisite degree of specificity to meet the NWF's burden on a motion for summary judgment. *Id.* at 3189.

The Court also held that certain additional affidavits by other NWF members alleging rampant violations of the law in the administration of the land withdrawal review program failed to provide the NWF with standing because the affidavits did not identify a specific final agency action ripe for judicial review, only a rule of general applicability. *Id.* at 3190. The Court indicated that an across-the-board challenge to a general program must be made to the elected Branches, not the Judicial Branch. *Id.* at 3191.

Finally, the Court rejected the argument that the NWF had standing under Section 10 of the APA because the Bureau of Land Management's failure to provide information and opportunity for public participation in the land withdrawal review program had impaired the NWF's ability to perform its "mission" to inform its members about conservation issues. *Id.* at 3193-94. The Court found that the NWF failed to identify any "particular 'agency action'" that was the source of this purported injury. *Id.* at 3194.

Lujan v. National Wildlife Fed'n suggested that the showing of a particularized injury is a required element of any standing analysis under the APA. Although *SCRAP* and its predecessors were not expressly overruled, the Court noted that *SCRAP* "has never since been emulated by this Court . . . ." *Id.* at 3189.

D. Respondents Have Not Alleged A Particularized Injury.

Unfortunately, the lower federal courts have chosen to regard *Lujan v. National Wildlife Fed'n* as merely imposing an additional pleading burden upon plaintiffs.[17] Thus, the court below held that respondents had met their burden to establish standing on two grounds. First, respondents had submitted affidavits showing that their members had visited foreign countries in which specific projects funded in part by United States aid funds would purportedly affect endangered species. The members asserted an intent to return in the future to these countries and that their ability to view wildlife would be impaired by the completion of the projects. 911 F.2d at 120. Second, the respondents alleged a procedural injury resulting from the failure of the Secretary of the Interior to carry out the required consultation procedure. *Id.* at 121-22.

Although the court below recognized *Lujan v. National Wildlife Fed'n* as being applicable, it held that the respondents had, unlike the NWF, provided specific facts indicating recreational use of specific habitats that would be affected by projects on which the Secretary of the Interior had not met his consultation obligation. *Id.* at

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[17] *E.g., Cornell Village Tower Condominium v. HUD*, 750 F. Supp. 909, 918 (N.D. Ill. 1990); *Greenpeace, USA v. Stone*, 748 F. Supp. 749, 755 (D. Hawaii 1990).

120-21. Assuming that this is correct and that, unlike the NWF's affidavits in *Lujan v. National Wildlife Fed'n*, the affidavits submitted by the respondents in this case do set forth with adequate specificity a "direct injury" to their recreational interests, *amici* argue that respondents still lack standing to challenge the interpretive regulation at issue because they have not suffered a particularized injury distinct from that suffered by the vast majority of other citizens.[18]

Respondents assert standing based upon two types of injuries. Respondents' first alleged injury was their diminished ability to observe wildlife in their natural habitat due to the impact on wildlife of development projects partially funded by the United States. But the ability of each citizen to observe wildlife in their natural habitat is diminished equally under the interpretive regulation at issue.[19] Respondents do not claim, nor can they claim, that they possessed a greater right than their fellow citizens to view wildlife in the affected habitats. Accordingly, respondents are not *distinctly* affected by the diminished ability to observe wildlife. In short, respondents have suffered no particularized injury.[20]

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[18]*Amici* do *not* argue that an interest in aesthetic, conservational or recreational values is insufficient to support standing, rather that any injury to such an interest must be particularized and not broadly shared by most Americans.

[19]50 C.F.R. § 402.01 (1986).

[20]There is a suggestion in the decision below that the respondents did suffer some harm different from other Americans because they actually visited the affected sites and expressed an interest to visit again in the future. 911 F.2d at 120-21. Past use, however, does not indicate the existence of an interest, it merely indicates the strength of the individual's interest. Respondents may *care* more about the diminished ability to observe wildlife in their natural habitat than

(continued...)

Respondents' second alleged injury was a "procedural injury" flowing from the Secretary of Interior's purported failure to observe the consultation requirement of the Endangered Species Act.[21] Again, however, the purported failure of the Secretary of Interior to observe the consultation requirement impacts all citizens equally. Respondents do not and cannot show that the consultation provision of the Endangered Species Act conveyed upon them any distinct right not enjoyed equally by all citizens. Respondents' asserted "right" to have the government act in accordance with the law is shared with all citizens and, therefore, is insufficient to satisfy Article III standing requirements. *Allen v. Wright*, 468 U.S. at 754; *Valley Forge*, 454 U.S. at 483-84. Respondents merely are attempting to employ a "federal court as a forum in which to air [their] generalized grievances about the conduct of government." *Flast*, 392 U.S. at 106.

The court below found standing predicated on respondents' "procedural injury" based on several decisions under the National Environmental Policy Act of 1969 ("NEPA").[22] 911 F.2d at 121. Three Circuits have recognized "procedural injury" as a basis for standing under NEPA, but each of those Circuits limited such a basis for standing to litigants who could establish a "geographic nexus" to a challenged project and presumably would suffer the environmental consequences result-

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[20](...continued)
other citizens, but "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Valley Forge*, 454 U.S. at 486. Nor can future injury be presumed from past use. *See City of Los Angeles v. Lyons*, 461 U.S. at 106.

[21]16 U.S.C. §§ 1531-1544 (1988).

[22]42 U.S.C. §§ 4321, *et seq.* (1988).

ing from the project's failure to comply with NEPA.[23] Because of the "geographic nexus" requirement, these decisions are consistent with the traditional standing requirement of a particularized injury.

For example, if a litigant lives next door to the site of a proposed toxic waste dump that is being established in violation of a particular regulatory requirement, certainly she suffers an injury as a result of that violation distinct from other citizens due to the prospective diminishment of her property value and lifestyle. She may share the injury with many other neighbors, but these neighbors still suffer in a manner distinct from the general public, because of their "geographic nexus" to the proposed toxic waste dump. Their standing is based on an injury to a particular substantive right other than a general interest in requiring the government to comply with regulations it has promulgated.[24]

The Eighth Circuit's decision below, however, expands these decisions under NEPA by reading out any "geographic nexus" requirement. 911 F.2d at 121. By

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[23]*City of Los Angeles v. NHTSA*, 912 F.2d 478, 492-93 (D.C. Cir. 1990); *Friends of the Earth v. United States Navy*, 841 F.2d 927, 931-32 (9th Cir. 1988); *City of Evanston v. Regional Transp. Auth.*, 825 F.2d 1121, 1126 (7th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988); *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975).

[24]The Eighth Circuit's reliance upon the citizen-suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g), to provide a statutory basis for respondents' procedural right is misplaced. This sort of citizen-suit provision cannot create standing under Article III. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981) ("citizen suit provisions apply only to persons who can claim some sort of injury"). Respondents must still be able to show a particularized injury to establish standing in order to challenge an administrative action whether the cause of action is brought under such a citizen-suit provision or Section 10 of the APA.

eliminating the "geographic nexus" requirement, however, the court essentially held that a public official's misinterpretation of a statute is, in and of itself, a sufficient basis to provide standing to any person or organization with an interest in the proper interpretation of the statute. Such a result flies in the face of this Court's most recent decisions on standing. *E.g.*, *Allen v. Wright*, 468 U.S. at 754 ("an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court").

The reasoning of the court below, however, follows directly from this Court's earlier decision in *SCRAP*, and it is not surprising that the Eighth Circuit relied upon *SCRAP*. This result is particularly disturbing given the seemingly unmistakeable message of the Court in *Lujan v. National Wildlife Fed'n* that the mere fact that a lawsuit is brought under Section 10 of the APA does not obviate the need to establish a particularized injury. Thus, the decision below points up the continuing confusion of the lower courts with respect to the requirements for standing under the APA.

Although the Court noted in *Lujan v. National Wildlife Fed'n* that *SCRAP*'s "expansive expression" of what would establish standing under Section 10 of the APA "has never since been emulated" by the Court, the Court treated *SCRAP* as irrelevant to its analysis because *SCRAP* arose in the context of a Rule 12(b) motion to dismiss on the pleadings. 110 S. Ct. at 3189. Because *Lujan v. National Wildlife Fed'n* came before the district court on a motion for summary judgment, lower courts viewed the Court's decision as seeming to suggest that a different standing analysis applied. This "procedural distinction" between *SCRAP* and *Lujan v. National Wildlife Fed'n* has been seized upon by the lower courts, such as the Eighth Circuit below, to mean that, although an

additional burden of specificity in asserting an alleged injury must be met by litigants in the context of a summary judgment motion, the *SCRAP* standing analysis remains valid.

There is no principled justification for the lower courts drawing such an artificial distinction between the standing analysis applicable to litigants faced with a motion to dismiss and litigants faced with a motion for summary judgment. In either procedural posture the plaintiff invoking the jurisdiction of a federal court in order to challenge an administrative action should be required to show a particularized injury distinct from most other citizens. Although the quantum of proof necessary to establish that particularized injury is greater in evaluating a motion for summary judgment than in evaluating a motion to dismiss, the central analysis remains the same -- has the litigant set forth an injury to herself distinct from most citizens?

In order to clarify the standing analysis applicable in the context of lawsuits challenging administrative action, the Court should take this opportunity to articulate formally what should have been clear after *Lujan v. National Wildlife Fed'n* -- that *SCRAP* is no longer good law. The Court has noted in the past that it will not hesitate to overrule a prior decision when such "a precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision, or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws. . . ." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (citations

omitted).[25] *SCRAP* and its predecessors fit squarely within this description. *SCRAP* sowed the seeds of doctrinal confusion that continue to bear fruit in the lower federal courts today. These decisions from the early 1970s have been an obstacle to the achievement of a consistent and uniform doctrine of standing grounded in the traditional requirement of a particularized injury. It is clear that the Court has retreated from *SCRAP* and has returned the doctrine of standing to its traditional basis in a particularized injury requirement. In overruling *SCRAP*, the Court would only be recognizing the reality of how its decisions have evolved and the law has changed.

CONCLUSION

The Court's relaxation of the traditional standing requirement of a particularized injury that began in 1968 and culminated with the *SCRAP* decision led to a dangerous overjudicialization of public policy making and an evisceration of the principle of separation of powers. This usurpation by the federal judiciary of powers

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[25]This is particularly true where, as here, time has demonstrated that a prior decision has had an adverse impact upon a constitutional issue such as the principle of separation of powers. As noted in *South Carolina v. Gathers*, 490 U.S. 805 (1989):

> I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face. "In constitutional questions, where correction depends upon amendment and not upon legislative action, this Court throughout history has freely exercised its power to re-examine the basis of its constitutional decisions."

490 U.S. at 825 (Scalia, J., dissenting) (quoting *Smith v Allwright*, 321 U.S. 649, 665 (1944)).

entrusted by the Constitution to the elected Branches threatened to erode our process of self-governance.

Recognizing these dangers, however, in the mid-1970s, the Court embarked on a retreat from the expansive view of standing articulated in *SCRAP*. The Court rediscovered the central role that the doctrine of standing serves in preserving the principle of separation of powers and restored the requirement of a particularized injury to the standing analysis in all manner of lawsuits not brought under the APA. Finally, last term in *Lujan v. National Wildlife Fed'n*, the Court seemingly acknowledged that there is no principled justification for not also requiring a showing of particularized injury in lawsuits brought under Section 10 of the APA.

The Court should recognize, however, that the lower courts still view *SCRAP* and its predecessors as living creatures in the world of standing analysis. The Court should acknowledge that the law of standing since *SCRAP* has returned to the traditional requirement of a particularized injury and the time has come to give to *SCRAP* the "formalistic burial of a case already dead."[26] In light of its more recent decisions, the Court should formally overrule *SCRAP*, in order to send an unmistakable message to the lower federal courts.

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[26]Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 Supreme Court Review 209, 226 (1963).

For the foregoing reasons, the decision of the United States Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

MANUEL LUJAN, JR.,
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Petitioner,

v.

DEFENDERS OF WILDLIFE, et al.,
Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICI CURIAE* THE STATES OF TEXAS, ARIZONA, ARKANSAS, CALIFORNIA, FLORIDA, MAINE, MICHIGAN, MINNESOTA, NEW JERSEY, NEW YORK, OHIO AND VERMONT AND THE CITIES OF NEW YORK, BALTIMORE, DENVER, ELIZABETH, LOS ANGELES, SAN FRANCISCO, SEATTLE AND BROWARD COUNTY IN SUPPORT OF RESPONDENTS

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On Writ Of Certiorari To The United States
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BRIEF OF *AMICI CURIAE*
THE STATES OF
TEXAS, ARIZONA, ARKANSAS, CALIFORNIA,
FLORIDA, MAINE, MICHIGAN, MINNESOTA,
NEW JERSEY, NEW YORK, OHIO AND VERMONT
AND
THE CITIES OF NEW YORK, BALTIMORE, DENVER,
ELIZABETH, LOS ANGELES, SAN FRANCISCO,
SEATTLE AND BROWARD COUNTY
IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICI CURIAE

Respondent's *amici*, numerous states and local governments, wish to bring to the attention of the Court an issue that threatens to have profound impact on state and local governments' ability to protect the health, safety and welfare of their citizens and residents. Cities and states could be denied access to courts to enforce the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-44, and other impor-

tant federal laws if the Court adopts Petitioner's argument advocating unprecedented restrictions on standing.

Cities and states regularly depend on environmental consultation and disclosure laws such as the ESA and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370b, to shape significant federal actions within their jurisdictions. These laws help ensure that federal activities do not inflict ill-considered, gratuitous harm on state and local communities. Underlying Petitioner's standing arguments is a broad challenge to the right of persons injured by the federal government's failure to follow procedural, planning or informational statutes to obtain access to and redress in federal court.

Two factors are crucial to the ability of states and local governments to protect their citizens: (1) no actor can be excused or made immune from procedural and substantive requirements, and (2) the consultation and disclosure process itself must be both meaningful and enforceable. If the Court adopts Petitioner's arguments, the federal government — often the major participant in a local project — might be able simply to ignore local concerns. This result would seriously undermine state and local governments' ability to protect their citizens.

Petitioner asks the Court to mandate that a plaintiff demonstrate not only a likelihood of harm and redressability, but "definite" and "immediate" harm and certain redressability. These standards surpass constitutional requirements. In matters affecting public health and the environment, harm frequently results from the cumulative impact of many separate actions over time. Awaiting demonstrable manifestation of harm, as defined by Petitioner, would all too often eliminate meaningful and economical remedies. Petitioner fails to recognize that once the iceberg has been struck, turning the ship will do little good.

The states and cities submit this *amicus* brief to retain their ability to guard the public health and safety of their citizens and their power to preserve and enhance their natural resources. Existing standing law preserves the

rights of states and local governments to seek judicial redress for violations — procedural or substantive — of requirements that Congress has established to protect the public health and environment. Petitioner would render many of these requirements unenforceable by state and local governments. Respondent's *amici* urge this Court to maintain the delicate balance in this important area of local and federal relations, to resist Petitioner's sweeping arguments and to decide the case on the basis of existing standing law.

SUMMARY OF THE ARGUMENT

The enforcement of procedural statutes is both well-established and critical to the protection of the public health, safety and welfare. The ostensibly advisory nature of the ESA and similar congressionally-mandated procedures does not defeat standing; rather, standing is well-recognized where a plaintiff otherwise meets standards established under Article III of the Constitution.

In this case, Petitioner posits intolerably exacting Article III standards. The Court's prior rulings make plain that a plaintiff need not wait until harm is certain before turning to the courts; nor demonstrate traceability with absolute certainty; nor prove that a favorable decision will redress the stated injury.

Petitioner's unprecedented limits on standing would eviscerate the states' and cities' ability to protect the health, safety and welfare of their citizens. Accordingly, the state and local governments urge this Court to reject Petitioner's position.

ARGUMENT

I.

STATES AND CITIES MUST BE ABLE TO ENSURE THAT FEDERAL AGENCIES COMPLY WITH PROCEDURES ENACTED TO PROTECT THEIR CITIZENS' HEALTH, SAFETY AND WELFARE

The Petitioner uses this case as a platform to launch a broad and baseless assault on the rights of *amici* and others to protect interests legitimately within their purview when they enforce procedural aspects of congressionally-enacted statutes in federal court. Such statutory provisions can be of extreme importance to *amici*. The Solicitor General is flatly mistaken in arguing that standing to enforce federal procedures is a "novel" notion; to the contrary, it is well-established. Hence, Petitioner's account of the causation and redressability legs of standing law, which would bar most, if not all suits to enforce procedural statutes, cannot be correct, and this Court should reject the misguided invitation to bar such suits.

A. The Important Right To Enforce Procedural Statutes Is Not "Novel"

Amici are gravely concerned by Petitioner's references to the "supposed 'procedural injury'" suffered by Respondents (Brief for the Petitioner [hereinafter "Pet. Br."] at 18) and by the assertion that standing to seek a remedy for such injury is a "novel theory." *Id.* at 29. Standing to require federal agencies to comply with statutes designed to promote better, cleaner and safer living conditions and an improved environment is of critical importance to *amici*. It is also firmly established.[1]

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1. The Court has repeatedly recognized, in other contexts, that procedural interests are important and worthy of protection. Indeed, the violation of procedures ranging from Fourth Amendment search and seizure restrictions to the Federal Rules of Civil Procedure and the

(continued. . .)

State and local governments regularly rely on congressionally-enacted procedural, planning and informational provisions to reduce the risk of harm to their citizens. For example, in addition to the ESA, NEPA, the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. §§ 11001-50, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*, and the Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451-64, all contain one or more significant procedural or informational components for federal agency compliance upon which cities and states rely.

Standing based on the failure to comply with procedural statutes has been accepted by each circuit of the federal Court of Appeals that has explicitly considered the question. *See, e.g., McGarry v. Secretary of the Treasury*, 853 F.2d 981, 984 (D.C. Cir. 1988) (discussing ERISA standing: "This court has made clear in the past that litigants have standing to bring actions to vindicate procedural rights guaranteed by statute.");[2] *Munoz-Mendoza v. Pierce*, 711 F.2d 412, 428 (1st Cir. 1983) (failure to perform required racial impact study required by HUD procedures was injury-in-fact sufficient for standing); *Motor Coach Industries, Inc. v. Dole*, 725 F.2d 958, 964 n.5 (4th Cir. 1984)

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1 *(. . . continued)*

Federal Rules of Evidence all give rise to a right of redress — whether or not it can be proved at the outset that a correction of the procedural violation would or even might yield a different result on the merits. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982), where the Court held that "[t]he right to use [state law] adjudicatory procedures shares [the] characteristics" of a property interest protected by the due process guarantees of the Fourteenth Amendment.

2. *See also Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 712 (D.C. Cir. 1988) (under NEPA, plaintiffs have the right to enforce preparation of an environmental impact statement ("EIS")); *Nat'l Maritime Union of Am. v. Commander, Military Sealift Command*, 824 F.2d 1228, 1237 (D.C. Cir. 1987) (disappointed bidder has procedural right to legally valid procurement process); *Nat'l Conservative Political Action Comm. v. Federal Election Comm.*, 626 F.2d 953, 957 (D.C. Cir. 1980) (agency's procedural violation of Federal Election Campaign Act, 2 U.S.C. §§ 431 *et seq.*, provided proper basis for standing).

(failure to follow procurement statutes and regulations is sufficient injury for standing purposes); *South East Lake View Neighbors v. Dep't of Housing & Urban Dev.*, 685 F.2d 1027, 1038 (7th Cir. 1982) (NEPA grants a procedural right in the agency decision-making process); and *Friends of the Earth v. United States Navy*, 841 F.2d 927, 932 (9th Cir.), *modified*, 850 F.2d 599 (1988) ("This court has long recognized that failure to follow [NEPA] procedures designed to ensure that the environmental consequences of a project are adequately evaluated is a sufficient injury in fact to support standing").[3] In each of these cases, the circuit court recognized that the violation of a procedural right itself, not the substantive harm arising out of the procedural violation, as Petitioner urges, can satisfy the injury-in-fact requirement for standing.

B. The Ostensibly Advisory Nature Of The ESA Consultations And Other Statutorily Mandated Agency Procedures Does Not Render Them Unenforceable

Indisputably, suits to remedy a procedural wrong must meet constitutional standards for injury, traceability and redressability. *See, e.g., Int'l Primate Protection League v. Tulane Education Fund*, 111 S.Ct. 1700, 1704 (1991). Thus,

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3. *See also Fernandez v. Block*, 840 F.2d 622, 631 (9th Cir. 1988) (invasion of procedural rights created by Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461, "sufficient to establish the requisite injury in fact"); *Or. Envtl. Council v. Kunzman*, 817 F.2d 484, 491 (9th Cir. 1987) (procedural failures in EIS preparation provide sufficient injury in fact to support standing); *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1380 (9th Cir. 1986) (violation of procedural rights under NEPA and its regulations sufficient for standing); *Dellums v. Smith*, 797 F.2d 817, 821 (9th Cir. 1986) ("Congress may . . . create procedural rights, the invasion of which constitutes injury-in-fact and suffices to support standing."); *Western Oil & Gas Ass'n v. Envtl. Protection Agency*, 633 F.2d 803, 808 n.4 (9th Cir. 1980) (injury caused by failure to comply with the procedures of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, sufficient to support standing); *City of Davis v. Coleman*, 521 F.2d 661, 670-72 (9th Cir. 1975) (failure to prepare an EIS in compliance with NEPA's procedures found to be sufficient injury to support standing).

amici agree that geographic nexus between the Respondents here and an area affected by the violation alleged is an appropriate — and may be a necessary — measure of the concreteness of a plaintiff's personal stake. *Amici* cannot agree, however, with the Solicitor General's unprecedented and untenable argument that because of the advisory nature of the challenged regulation, the requisite redressability is necessarily missing from this case. In the first place, the regulation is in no sense "non-binding." In the second, to the extent that consultation under Section 7 of the ESA, 16 U.S.C. § 1536, does not guarantee substantive results, this is a feature shared by numerous other statutes, the enforceability of which is well-established.

1. Consultation Is Not An Optional Process

In arguing that revision of the regulation at issue would not redress Respondents' complaint, the Solicitor General repeatedly and wrongly characterizes the regulation as "non-binding." Pet. Br. at 24 and 25. This assertion, made without support, cannot be reconciled with the Petitioner's role as the official with "primary responsibility for implementing Section 7," (*Nat'l Wildlife Fed'n v. Coleman*, 529 F.2d 359, 371 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976), or with his express statutory authority for such regulations. *See* 16 U.S.C. § 1540(f). It is equally at odds with Petitioner's own well-documented position on the mandatory nature of consultation. For example, when the Secretary of the Interior (the "Secretary") gave notice of adoption of the regulation in question, he cautioned that "all Federal actions including 'conservation programs' are subject to the consultation *requirements* of section 7(a)(2) . . . ." 51 Fed. Reg. 19,929 (1986) (emphasis added). Similarly, the regulations note that consultation is "required" unless otherwise excused by the regulations, or the terms of the statute, and establish procedures for Petitioner's delegate, the Director of Fish and Wildlife Service, to initiate consultation with dilatory agencies. *See* 50 C.F.R. § 402.14(a).

The courts, too, have made it plain that consultation is not optional. Although each federal action agency must ultimately decide whether its project may jeopardize endangered species, this decision can be made only after action agencies have fulfilled their procedural duties under Section 7. *Sierra Club v. Froehlke*, 534 F.2d 1289, 1303-1304 (8th Cir. 1976) (the responsibility for decision *after consultation* is not vested in the Secretary, but in the action agency); *National Wildlife Fed'n v. Coleman*, 529 F.2d at 371 (*once the action agency has had meaningful consultation* with the Secretary, the final decision of whether or not to proceed lies with the action agency). Thus, Section 7's procedural requirements are a necessary prerequisite to an action agency's decision-making process.

In addition, Section 7's formal consultation process creates an administrative record upon which federal courts rely in determining whether federal action agencies have satisfied their Section 7 substantive duties.[4] Courts give substantial weight to "biological opinions" produced by the Secretary as a result of consultation, when assessing an action agency's compliance with the ESA. *See Roosevelt Campobello Int'l Park Comm. v. United States Envtl. Protection Agency*, 684 F.2d 1041, 1049 (1st Cir. 1982). Thus, even if Section 7's formal consultation process were somehow optional, federal agencies would, as a practical matter, have a strong incentive to avail themselves of it.

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4. *See, e.g., Pyramid Lake Paiute Tribe of Indians v. United States Dept. of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990) (U.S. Navy was entitled to rely on opinions of Fish and Wildlife Service in meeting its ESA duties); *Bergen County v. Dole*, 620 F. Supp. 1009, 1063 (D.N.J. 1985), *aff'd*, 800 F.2d 1130 (3d Cir. 1986) (federal agencies were entitled to rely upon consultation with U.S. Fish and Wildlife Service in discharging their duties under the ESA section 7 (a) and (c)); *North Slope Borough v. Andrus*, 642 F.2d 589, 610 (D.C. Cir. 1980) (no substantive section 7 violation because of compliance with final biological opinion by National Marine Fisheries Service); *Nat'l Wildlife Fed'n v. Coleman*, 529 F.2d at 375 (court of appeals would defer to Secretary to determine what modifications were necessary to bring highway project into compliance with section 7).

For similar reasons, there is no merit in the Solicitor General's argument that redressability founders on the possibility that "informal" consultations may substitute for for Section 7's requirements. Pet. Br. at 22. The proposed substitution of an *ad hoc* process for safeguards Congress mandated in the ESA cannot be squared with the great detail devoted to consultation in the statute, *see* 16 U.S.C. § 1536(b)-(d) or, for that matter, with the notion that we are a society of laws. The argument is, in fact, little more than the bare claim that executive agencies are free to ignore congressional directives.

2. Post-Consultation Agency Discretion Does Not Deprive Respondents Of Standing And The Courts Have So Recognized Under Other Statutes

The Secretary argues that the ESA consultation process mandated in Section 7 is of an advisory nature and, on that ground, cannot meet Article III's redressability (or traceability) requirement. Petitioner asserts that "action agencies are ultimately responsible for making their own decisions about what is required of them under Section 7(a)(2)" (Pet. Br. at 25), implying that the failure to consult is, in effect, irrelevant. Petitioner's analysis is as applicable to domestic projects as it is to those located overseas and, if accepted, could undermine the standing of state and local governments (and others) to protect endangered species by suing to enforce federal agencies' ESA consultation obligations on projects within their borders.

Beyond the ESA, state and local governments need to be able to, and regularly do, challenge federal agency failures to follow congressionally-mandated procedures in a variety of other statutes. *See, e.g., City of Los Angeles v. Nat'l Highway Traffic Safety Admin.*, 912 F.2d 478 (D.C. Cir. 1990); *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975); and *United States v. 27.09 Acres of Land*, 760 F. Supp. 345 (S.D.N.Y. 1991). Yet Petitioner would have such suits dismissed because "the causal connection between the

interpretative regulation and the asserted injury . . . is 'highly indirect'" and "the prospect of redress . . . correspondingly speculative." Pet. Br. at 26 and 27. Without "assurance" that a project will be redesigned or stopped as a result of judicial action, under Petitioner's theory these plaintiffs would have lacked standing.

Given the extreme number and range of established causes of action to which it would apply, Petitioner's argument is simply untenable. The wholesale reversal of firmly established law that would follow from this Court's acceptance of this argument is perhaps most obvious in the context of NEPA cases. NEPA requires federal agencies to prepare an environmental analysis of the impact of their actions but does not require implementation of any particular substantive measures. Thus in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989), the Court acknowledged that it is unnecessary to demonstrate that remedying a procedural error will remedy a substantive harm. The Court reasoned that "[o]ther statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed — rather than unwise — agency action." *Id.* at 351. As a result, an EIS may have no impact whatsoever on a potentially harmful project, but this Court has consistently entertained suits that sought to decrease the likelihood of inadvertent environmental harm through enforcement of NEPA's procedural mandates.[5]

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5. *See, e.g., Marsh v. Or. Natural Resources Council*, 490 U.S. 360 (1989) (standing not questioned in reviewing organization's claim that a supplemental EIS was required); *Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87 (1983) (standing not questioned in reviewing Nuclear Regulatory Commission regulations governing consideration of environmental impact of nuclear power plant license; also affirming the information function of NEPA); *Weinberger v. Catholic Action of Hawaii / Peace Educ. Project*, 454 U.S. 139 (1981) (not questioning standing of organizations to challenge Navy's failure to disclose publicly an EIS concerning construction of facility capable of storing nuclear weapons); *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980) (not questioning standing in reviewing adequacy of agency's consideration of environmental impact).

Petitioner unpersuasively seeks to distinguish cases in which standing was found based on procedural violations of NEPA, by differentiating the EIS public information function from the ESA's consultation process. Pet. Br. at 29 and 30. This distinction does not withstand analysis. Because NEPA procedures are purely procedural in nature, violations of NEPA can never cause substantive impacts that would satisfy Petitioner's redressability arguments. The failure to generate or supply the requisite information would never require that a federal agency take a particular course of action on any parcel of land. Rather it would create only an abstract "informational" injury without any resultant substantive impacts on a physical site. Consequently, the Secretary's argument that Respondents lack standing because of the nature of the ESA consultation process applies with equal force to NEPA's procedural requirements.

Moreover, NEPA is by no means the only illustration of why it is irrelevant that ESA consultation does not guarantee a substantive outcome. Demanding that a plaintiff provide "assurances" of substantive redressability would lead to absurd results under other statutes. It would be, for example, difficult to prove the substantive results of an emergency evacuation plan or an inventory of toxic chemicals. *See, e.g.*, EPCRA, 42 U.S.C. §§ 11003, 11022. And the CZMA, a crucial planning tool for coastal governments, has consultative provisions almost identical to Section 7(a)(2) of the ESA. *See* 16 U.S.C. § 1456(a) and (c)(1). Similarly, notice and comment rulemaking under the APA, 5 U.S.C. § 553, is designed to ensure that federal agencies have the views of interested parties before them, not that they adopt those views or reach a specific substantive decision. Such procedures are just as "advisory" as the ESA consultation.

It is not surprising, therefore, that courts that have addressed this issue have found no redressability defect simply because no substantive vindication was assured. For instance, Judge Bork addressed Article III's traceability requirement with regard to a procedural injury in *Nat'l Maritime Union*. Discussing the standing of a disappointed

bidder in a government procurement process, Judge Bork stated: "[A] bidder's right to a fair procurement is obviously an injury both traceable to the alleged illegality in a procurement and redressable by any remedy that eliminates the alleged illegality." *Nat'l Maritime Union*, 824 F.2d at 1237-38 (footnote omitted). Judge Bork also noted that if the underlying substantive economic injury were held to be the sole basis of the disappointed bidder's standing, traceability problems would be likely (presumably because, even had proper procedures been followed, the disappointed bidder might not have been awarded the contract). *Id.* at 1238, n.13. Elsewhere, the D.C. Circuit explained that "[i]t is a well-established rule that a party suing to vindicate such [procedural] rights need not make a showing that the agency would have acted differently." *McGarry*, 853 F.2d at 985. *See also Munoz-Mendoza*, 711 F.2d at 428 ("Article III of the Constitution does not require a plaintiff to show that use of a mandated procedure would change an agency's substantive action."); *id.* at 428-29 ("if plaintiffs were required to show that different procedures would result in different substantive choices, federal courts would be required to pass judgment, in the guise of a standing inquiry, upon substantive issues that agencies rather than courts ought to resolve in the first instance.").

II.

PETITIONER SUGGESTS INTOLERABLY EXACTING STANDARDS FOR ALL FACETS OF THE INQUIRY INTO CONSTITUTIONAL STANDING

In addition to its untenable position on "advisory" procedures, Petitioner's brief also invites this Court to engage in an across-the-board reformulation of the established constitutional prerequisites for Article III standing. The suggested standards for injury-in-fact, traceability and redressability would deprive many legitimate claims, often asserted by *amici*, of a hearing in federal court. However ill-advised these standards may be as a general matter,

they are even more indefensible where Congress has enacted an explicit citizen suit provision.

A. Would-Be Plaintiffs Need Not, As Petitioner Asserts, Wait Until Harm Is Certain Before Turning To The Courts

Amici leave to the parties the debate over whether the specific affidavits in this case suffice to establish standing for Defenders of Wildlife ("Defenders"). *Amici*'s principal concerns have to do with the standards by which such affidavits are judged (and as discussed in Part I, with arguments to the effect that no affidavits could suffice for the type of claim asserted here). Most striking and troubling of those advocated by Petitioner are the ones relating to certainty and immediacy of injury.

Petitioner's proposal that Defenders be required to demonstrate concrete substantive harm with absolute certainty, *see* Pet. Br. at 17, 20, 23 and 24, ignores the time-honored principle that *threatened* harm is sufficient to form a basis for standing. *See, e.g., Heckler v. Mathews*, 465 U.S. 728, 738 (1984); *Valley Forge Christian College v. Am. United For Separation of Church and State*, 454 U.S. 464, 472 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). This allows "those who plausibly anticipate future injury to bring suit." *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d at 705. *See also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979) (threatened harm from enforcement of Arizona statute sufficient to form basis for standing).[6]

In addition, the Secretary's demand for an extraordinary degree of certainty in the demonstration of substan-

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6. Petitioner's arguments could also threaten standing to challenge statutes with substantive requirements such as the Clean Water Act, 33 U.S.C. §§1251-1387, or the Clean Air Act, 42 U.S.C. §§7401 *et seq*. One can rarely show that a single discharge is causing a measurable increment of harm or that cessation of a discharge would guarantee a measurable improvement. Yet the Court has affirmed the right to bring such suits. *See, Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 65 (1987).

tive harm runs contrary to the remedial purposes of statutes such as the ESA and NEPA. If a plaintiff must wait until endangered species are jeopardized to enforce the procedures that Congress designed to prevent that occurrence, the usefulness of the congressional ounce of prevention provided by the ESA's consultation process is greatly diminished. And, once an endangered species becomes extinct, although a plaintiff may then be able to demonstrate harm under the Secretary's scheme, even a judicial pound of cure can never bring back the lost species.

This is precisely the position in which Petitioner would leave those seeking to enforce the ESA's procedural and substantive constraints on federal agency actions. Because the ESA requires no additional action — other than consultation — before commencement of a project, if plaintiffs cannot challenge failure to consult they will apparently have to await the project's start before seeking to force consultation. By then it may be too late: irremediable harm to species may already have occurred.[7]

B. Petitioner's Characterization Of The Standards For Traceability And Redressability Are Equally At Odds With Esta blished Law

Petitioner's demand that Defenders demonstrate traceability with absolute certainty badly overstates constitutional strictures. Article III requires only that a plaintiff demonstrate a substantial likelihood that the defendant's action would result in the injury claimed. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 77-78 (1978). The essence of the standing requirement is merely to de-

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7. Similarly unconvincing is Petitioner's suggestion that in this case Respondents' standing should depend on whether at all times at least one Defenders' member is stationed in the Nile crocodile's habitat (thus meeting the Secretary's proposed requirement that Defenders' members engage in "on-going visits" to the disputed sites). Pet. Br. at 23. Nor should Defenders' standing rest on whether Joyce Kelly has confirmed a return trip to Egypt within a short period of time (demonstrating, as the Secretary would have it, that "visits will definitely occur in the immediate future"). Pet. Br. at 23-24.

cide "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Id.* at 500.

Thus, Petitioner is incorrect in arguing in effect that an analysis on the merits is necessary to determine whether specific harm results from the alleged illegal conduct. If Petitioner were correct, Defenders would be required to perform a precise, in-depth examination of the effects a federal agency action would have on endangered species, the very analysis Defenders is seeking to compel in this lawsuit. Petitioner's argument would thereby require that plaintiffs themselves supply much of the relief they seek. For that reason lower courts determining standing under NEPA have rejected the Secretary's argument. *See, e.g., City of Los Angeles*, 912 F.2d at 496; *City of Davis*, 521 F.2d at 670-71 (if this standing requirement existed, "we would in essence be requiring that the plaintiff conduct the same environmental investigation that he seeks in his suit to compel the agency to undertake.")

Petitioner's version of the redressability requirement is also much stricter than established precedent. It is a long-held principle that a party seeking judicial relief need not show to a certainty that a favorable decision will redress his injury. A mere likelihood will do. *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 261 (1977). *See also Valley Forge*, 454 U.S. at 472 and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 280-81 (1978) (observing that a plaintiff's right to be considered may not have substantive results for that plaintiff).

In a case closely paralleling this one, the Court not long ago expressly investigated standing and found adequate redressability. *See Japanese Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 222, 230 n.4 (1986). Plaintiffs, a group not unlike Defenders, sought to force a cabinet officer to follow a process designed to encourage a foreign power to reduce its impacts on marine wildlife. *Id.* at 223. The foreign power, however, remained quite free to ignore the

pressure if it so chose. Nonetheless, the Court was able easily to conclude that "respondents may avail themselves of the right of action created by the APA." *Id.* at 230 n.4.

C. Congressional Enactment Of A Citizen Suit Provision In The ESA Makes Restrictive Standing Rules Particularly Inappropriate

The Secretary's plea for imposing difficult if not impossible standing requirements is especially misplaced in this case because of the existence of a citizen suit provision. Through Section 11(g) of the ESA, 16 U.S.C. § 1540(g), Congress has explicitly authorized a broad range of parties to enforce the ESA's provisions, including Section 7's consultation requirements. Section 11 empowers "any person" to enjoin a violation of "any provision" of the ESA or regulations issued under the authority of the ESA. 16 U.S.C. § 1540(g)(1)(A). The ESA's definition of persons entitled to sue includes not only individuals and associations, such as environmental groups, but also state and local governments, such as *amici*. 16 U.S.C. § 1532(13).

Of course, as the Solicitor General points out, Congress cannot dispense with the bedrock constitutional standing requirements necessary to ensure that Article III courts hear only actual controversies. *See* Pet. Br. at 28. It is equally indubitable, however, that Congress has the power to create statutory rights, the invasion of which can provide the basis for standing. *Warth*, 422 U.S. at 500. *See also Allen v. Wright*, 468 U.S. 737, 763 (1984); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982). This is true even if the plaintiff claims an injury shared by a large class. *Warth*, 422 U.S. at 499. Recently, in *Lujan v. Nat'l Wildlife Fed'n*, 110 S.Ct. 3177, 3181 (1990), the Court noted Congress' ability to create rights of action by acknowledging that explicit statutory authorization would have provided the complainant with a separate basis on which to challenge agency administrative processes.

The Secretary has suggested that Defenders' lawsuit is not properly brought under Section 11 on the theory that

Section 7's consultation provisions do not mandate his participation and thus that his failure to consult does not violate the ESA. Pet. Br. at 29 n.18. This argument hardly squares with Section 7's explicit provisions. In Section 7, Congress prescribed a careful and detailed consultation process which requires the participation of two parties — the Secretary and the action agency. It is nonsensical to assume, as Petitioner does, that Section 7 mandates the behavior of the action agency alone and that the Secretary could with impunity thwart Congress' carefully elaborated intent by declining to engage in the prescribed consultation. ESA consultation is not optional for the Secretary, and his refusal to engage in it, whether in individual instances or by wholesale regulation, is a violation of the act, amenable to suit under 16 U.S.C. §1540(g)(1)(A).

CONCLUSION

The Court should reject Petitioner's standing analysis and enforce the congressional mandate granting a broad range of parties the right to ensure that the federal government fulfills the ESA's procedural and substantive requirements. By doing so, the Court will ensure that the nation's states and local governments can require federal agencies to take their constituents' health, safety and welfare into account, not only under the ESA but also under a host of other statutes, whose very viability is at stake in this litigation. Simply stated, adopting Petitioner's tortured standing analysis could have the effect of limiting the ability of states and local governments to protect their local environment, and could insulate federal agencies from complying with congressional directives enacted for the benefit of all.

Respectfully submitted,

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Supreme Court of the United States
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MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,
Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF ZOOLOGICAL PARKS & AQUARIUMS AND FRIENDS OF THE EARTH IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1424

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,
Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF ZOOLOGICAL PARKS & AQUARIUMS AND FRIENDS OF THE EARTH IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICI CURIAE*

Amicus curiae, the American Association of Zoological Parks & Aquariums (AAZPA), is a professional association representing virtually every major zoological park, aquarium, wildlife park and oceanarium in North America.[1] The members of AAZPA provide educational pro-

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[1] Both parties have consented to the filing of this brief *amici curiae*. The letters of consent are on file with the Clerk of the Court.

grams, research facilities, and insights into the animal kingdom for the 112 million annual visitors to North America's zoos and aquariums.

AAZPA helps coordinate the conservation and research programs of its members. Its members maintain research facilities throughout the world. The ability of its member organizations to conduct important biological research into endangered species worldwide would be significantly hampered by a restrictive interpretation of the Endangered Species Act. AAZPA has created the Species Survival Plan, a prototype program to protect endangered animals. Forty-nine of fifty-six species in the program have habitats outside of the United States. Several of these species, including the Asian and African elephant, orangutan, and Sumatran rhinoceros, are threatened by projects at issue in the record of this case. Finally, the educational function of zoos and wildlife parks depends on the survival of endangered species throughout the world. More than eighty percent of species exhibited in member institutions have natural habitats outside the United States.

Amicus curiae Friends of the Earth is an organization with 50,000 members and supporters in the United States. Its activities include research, education, litigation and lobbying on a range of international, national and local environmental and wildlife conservation issues. Friends of the Earth is the U.S. affiliate of Friends of the Earth International, a worldwide network with member organizations in forty-three countries. Most of these countries are affected by U.S. agency actions that the courts below held are covered by Section 7 of the Endangered Species Act.

SUMMARY OF ARGUMENT

Section 7 of the Endangered Species Act applies to U.S. agency actions with effects abroad for at least three independent reasons.[2] First, there is nothing "extra-territorial" about applying Section 7 to regulate the internal processes of the United States government. The consultative procedure occurs in this country and is subject solely to the principles of American law. The requirement of "no jeopardy" to endangered or threatened species applies only to U.S. government agency actions; foreign governments are affected only if they voluntarily choose to accept U.S. agency assistance for their projects.

Second, even if this case were deemed to involve the extraterritorial application of U.S. law, the global nature of environmental problems together with the limited burden of Section 7 make inapplicable any presumption that Section 7 should apply only domestically. This Court evaluates each area of law separately before deciding to apply the presumption against extraterritoriality to that area, and the considerations that led the Court to apply that presumption in areas such as labor and employment argue against extending any such presumption to environmental laws such as Section 7.

Third, in any event, the government has functionally conceded that this law applies extraterritorially. The government's own regulation applies Section 7 to the high seas, an area outside the territorial jurisdiction of the United States.

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[2] Section 7(a)(2) provides, in relevant part: "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species[.]" 16 U.S.C. § 1536(a)(2) (1988).

ARGUMENT

> The wild goose is more of a cosmopolite than we; he breaks his fast in Canada, takes a luncheon in the Ohio, and plumes himself for the night in a southern bayou.
>
> Henry David Thoreau [3]

The extinction of species is one of the greatest environmental threats facing the world community. Many scientists believe that the world is already undergoing one of the largest mass-extinctions in the history of the planet.[4] In 1973, Congress passed the Endangered Species Act, 16 U.S.C. §§ 1531-44 (1988 & Supp. I 1989), to provide a comprehensive U.S. response to this critical problem. A central part of the Endangered Species Act is Section 7, which prescribes that each federal agency shall consult with the Secretary of the Interior to ensure that any action that agency authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered species or threatened species. 16 U.S.C. § 1536 (a) (2).[5] This rule is meant to ensure that extinctions do not occur as the result of actions of the federal government itself.

The two decades since the passage of the Endangered Species Act have demonstrated the wisdom of this aggressive approach to protecting endangered species around the world. In that time, the populations of familiar species

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[3] H. Thoreau, *Walden and "Civil Disobedience"* 212 (Signet Classic, New American Library ed. 1960).

[4] D. Jablonski, *Extinctions: A Paleontological Perspective*, 253 Science 754 (Aug. 16, 1991); *cf.* P. Erlich & E. Wilson, *Biodiversity Studies: Science and Policy*, 253 Science 758 (Aug. 16, 1991).

[5] For actions affecting the high seas, the required consultation is with the Secretary of Commerce. The Secretary of the Interior has delegated land consultations to the Fish and Wildlife Service; the Secretary of Commerce has delegated high-seas consultations to the National Marine Fisheries Service.

such as giant pandas, rhinos and elephants have declined by fifty percent or more.[6] Populations of some migratory songbirds in U.S. states declined by as much as eighty percent in the 1980's alone.[7]

Section 7 of the Endangered Species Act was interpreted from the time of its enactment to apply to all U.S. government actions, in this country or elsewhere, until 1986 when the Interior Department promulgated the regulation at issue here, 50 C.F.R. § 402 (1990). In the case now before the Court, the Secretary urges that the statute does not mean what it clearly says. The Secretary argues that this Court should imply a limited geographic scope into the unambiguous, unlimited language of Section 7. The Secretary urges that Section 7 should apply only to federal agency action carried out wholly within U.S. territorial jurisdiction, and that outside of this country, federal agencies should be free to cause the extinction of entire species of life. This position should be rejected.

I. THE CHALLENGED APPLICATION OF SECTION 7 CANNOT PROPERLY BE CLASSIFIED AS "EXTRATERRITORIAL"

The Secretary rests almost entirely on the argument that applying Section 7 to the agency actions at issue here constitutes an "extraterritorial" application of the Endangered Species Act, and that such an application contradicts principles of statutory interpretation. As a threshold matter, however, the Court need not reach the dispute over the proper theory of statutory construction, because there is nothing "extraterritorial" about regulating the internal activities of the United States government.

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[6] *See, e.g.*, Wu Dunn, *Pessimism Is Growing on Saving Pandas from Extinction*, N.Y. Times, June 11, 1991, at C4, col. 1 (50% decline in giant pandas); Hawkes, *Agony and Ivory*, The Times (London), Aug. 3, 1991 (75% decline in Kenyan elephants).

[7] Schulz, *Outdoors: Migrating Songbirds*, Associated Press, May 13, 1991, Domestic News.

This Court has been reluctant to apply U.S. law where another country could demonstrate that its rights and authority would be infringed. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).[8] Thus, the Court has sometimes declined to apply U.S. law where it would regulate the activities of persons outside the United States,[9] or governments outside the United States,[10] and where that regulation would conflict with foreign law. The application of Section 7 to federal agency activities to be undertaken in foreign countries does not implicate such a concern. Section 7 does not declare any private action taken in a foreign country to be illegal. It does not prescribe United States environmental standards or regulations for foreign countries. Any foreign country that elects to take action that will threaten its endangered wildlife may do so; it simply must do so without U.S. assistance. The decision by the United States to refrain from spending U.S. funds or to decline to continue a particular U.S. agency program is an issue that can only be judged under U.S. law; there is no potential for conflict with foreign law.

Section 7 of the Endangered Species Act contains two requirements: (1) a procedural requirement that federal agencies consult with one another; and (2) a substantive requirement that agencies not jeopardize endangered wildlife. As the Secretary concedes, the consultations consist

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[8] As discussed below, the holding of *American Banana*—that the U.S. antitrust laws do not apply to conduct outside of the U.S.—has since been overruled. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-05 (1962).

[9] *See EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991) (*"Aramco"*). Indeed, this Court has sometimes applied this rationale so as not to apply U.S. law to disputes between purely foreign parties while in U.S. territory. *See McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10 (1963) (labor dispute between foreign sailors and foreign vessel owners in U.S. port); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957) (same).

[10] *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Underhill* v. *Hernandez*, 168 U.S. 250 (1897).

of "structured deliberations—which are *wholly internal* to the United States Government[.]" [11] This consultation occurs entirely within the juridical confines of the United States and is subject only to the requirements of domestic law. The consultations take place physically within a few blocks of this Court. The adequacy of the Section 7 consultation can be judged only by domestic law. No foreign law could apply.

The substantive "no jeopardy" requirement of Section 7 applies only to the actions of the U.S. government.[12] Domestically, this requirement may in some circumstances prevent a project from going forward at all. Applied abroad, the question primarily is whether the United States will subsidize another nation's projects.[13] As this Court held last term, it is Congress' right to decide which projects are subsidized with U.S. money. *Rust v. Sullivan*, 111 S. Ct. 1759, 1775 (1991). "[T]o avoid the force of the regulations, [the recipient] can simply decline the subsidy." *Id.* at 1775 n.5. Similar conditions on federal aid to states have never been held to infringe state sovereignty.[14]

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[11] Brief for Petitioner Manuel Lujan, Jr., Secretary of the Interior at 32 (filed July 12, 1991) (hereinafter "Br.") (emphasis added).

[12] The Solicitor of the Interior Department, in his interpretation of Section 7 most nearly contemporaneous with passage of the Act, rejected the argument that the section would infringe foreign sovereignty on exactly this basis: "It should be remembered that the jeopardy clause actually applies only to U.S. agencies[.]" J.A. at 185.

[13] From time to time, U.S. agencies may undertake unassisted projects abroad (e.g. Voice of America radio towers). But again, the decision to modify or forgo such a project so as not to jeopardize endangered species is not "extraterritorial"; the decision concerns only how U.S. agencies spend U.S. money. The possibility of conflict with other governments is even less than in the more typical case where the United States is assisting a foreign government's project.

[14] *See, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding minimum drinking age/receipt of highway funds tie);

The Secretary claims, without any record support, that the "no jeopardy" requirement may sometimes affront foreign sensibilities. Br. at 46-47. This is very different from an argument that Section 7 conflicts with foreign rights, and is not enough to make the application of Section 7 "extraterritorial." In fact, the political branches frequently attach restrictions on the use of U.S. foreign aid funds.[15] As the government itself concedes, recipients of funds from the U.S. Agency for International Development must agree to environmental conditions complementary to those in Section 7 of the Endangered Species Act.[16] Among many other conditions, foreign aid recipients must typically agree not to violate U.S. notions of what constitutes bribery, and must comply with U.S. legislation forbidding the boycott of Israel.[17] There is nothing unprecedented or even unusual about interpreting Section 7 in a way that affects projects assisting foreign governments.

In sum, Section 7 is merely one of many laws that impose substantive and procedural restrictions on federal

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Nevada v. Skinner, 884 F.2d 445 (9th Cir. 1989) (upholding speed limit/highway funds tie), *cert. denied*, 110 S. Ct. 1112 (1990).

[15] *See, e.g.*, 22 U.S.C. § 2151b(f)(1) (1988) (conditioning any contribution to the United Nations' Population Fund on assurances that the Fund not engage or assist in abortion); Pub. L. No. 101-513, 1990 U.S. Code Cong. & Admin. News, *to be printed at* 104 Stat. 1979, 2016 (applying same restrictions on all foreign assistance funds).

[16] *See* 22 U.S.C. § 2151q(g) (1988) (directing Administrator of AID to take various actions to protect endangered species); *cf.* 22 U.S.C. § 262m-2, -4, -5, -7 (1988 & Supp. I 1989) (U.S. to vote shares in World Bank and similar bodies with consideration of environmental concerns); Pub. L. No. 101-513, 104 Stat. at 2013-16 (imposing environmental restrictions on all foreign aid funds).

[17] *See, e.g.*, 22 U.S.C. § 2779(c) (1988) (bribery); 50 U.S.C. App. § 2402(5)(a) (1988) (Israeli boycott); Pub. L. 101-513, 104 Stat. at 1982 (same).

government decisions. If the Secretary's position were correct, none of these laws that assure regularity in the practice of government—the Administrative Procedure Act, the Merit Systems Protection Act, the Government in the Sunshine Act, the Ethics in Government Act, or the Freedom of Information Act, to name a few—would apply whenever the specific decision at issue has an impact in a foreign nation.[18] The Secretary has cited no case, in this Court or in any other, in which rules structuring government decisions have been deemed an "extraterritorial" application of law.[19] While Section 7 may sometimes have an international component, its requirements are intrinsically domestic and a direct incident of American sovereignty. This procedure cannot properly be deemed extraterritorial.

II. THE ENDANGERED SPECIES ACT WAS ENACTED AGAINST THE BACKGROUND OF INTERNATIONAL CHOICE-OF-LAW PRINCIPLES THAT EXTEND THE ACT TO U.S. ACTIONS AFFECTING SPECIES OUTSIDE THE UNITED STATES

Even if requiring compliance with Section 7 for projects abroad were deemed an extraterritorial application of the Act, the Secretary's contention—that such an ap-

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[18] None of these statutes specifically states that it applies to decisions having some impact in foreign states, although of course none is specifically limited to actions with purely domestic effect.

[19] The Secretary's reliance on *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990), Br. at 33, 45, is disingenuous. There, the Court held that the Fourth Amendment, which extends to "the people," does not protect foreign citizens outside of the United States, 110 S. Ct. at 1065; the Court did not hold that the Fourth Amendment never applies outside this country. *Cf. Reid v. Covert*, 354 U.S. 1 (1957) (Fourth and Fifth Amendment constraints do apply to military trial of U.S. citizens abroad). *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949), involved the failure of a private employer (a government contractor) to provide overtime pay for work done in two foreign countries, and does not address statutory constraints on the government itself.

plication is presumptively impermissible—cannot be sustained.

A. The Judicially-Created Presumption Against Extraterritoriality Is Merely an Aid to Statutory Construction

The presumption against extraterritoriality upon which the Secretary relies is purely a judicial creation. Such presumptions have vitality only to the extent that they produce an accurate reflection of the intent of Congress.[20] This Court has long recognized that presumptions and other principles of statutory construction are not rules of law, but are instead common-sense guides to ascertain what the political branches likely intended: [21]

> Generalities about statutory construction help us little. They are not rules of law but merely axioms of experience. They do not solve the special difficulties in construing a particular statute. The variables render every problem of statutory construction unique.[22]

In each new area of law, the Court has always considered whether and to what extent the presumption against extraterritoriality reflects the will of the political branches.[23] As discussed below, in the context of environ-

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[20] *United States v. Albertini*, 472 U.S. 675, 680 (1985) ("Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution").

[21] *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 672 n.3 (1986) (a presumption is controlling only "where substantial doubt about the congressional intent exists").

[22] *Weinberger v. Rossi*, 456 U.S. 25, 28 (1982) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952)).

[23] As this Court has said about a related principle of statutory construction: "this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493 n.11 (1985) (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985)).

mental regulation, a presumption in favor of extraterritorial application is more plausible than the presumption urged by the Secretary.

B. Any Presumption Against Extraterritoriality Does Not Apply to Environmental Laws in General or to the Endangered Species Act in Particular

Environmental menaces pose unique threats to the international community. Events in one nation may have profound consequences for neighboring--or even distant --countries.[24] The Kuwaiti oil fires[25] and the Chernobyl nuclear reactor explosion[26] are just two recent examples of the impossibility of countries' sealing their borders from environmental disasters occurring abroad.

The worldwide depletion of the ozone layer may lead to millions of new cases of skin cancer in the United States alone.[27] Acid rain from the United States has "killed" more than 17,000 bodies of water in Canada and may have eliminated a variety of fish from these lakes and rivers.[28] Global warming may transform entire ecosys-

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[24] As discussed below, the fact that an action overseas has effects in the United States is an accepted basis under international law for U.S. legislation to regulate that action. *See* Restatement (Third) Foreign Relations Law of the United States § 402(1)(C) (1986); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

[25] *See, e.g., Oil "May Have Killed 20,000 Birds"*, Press Ass'n Ltd., Mar. 28, 1991; Hiltzik, *Sifting Through the Wreckage of a Shattered Ecosystem*, L.A. Times, Mar. 5, 1991, at 3, col. 1.

[26] *See Fears Over Radiation Spreading in Europe*, Chicago Tribune, May 3, 1986, at 5; *Japan Finds Higher Radiation in Rain*, L.A. Times, May 5, 1986, pt. 1, at 6, col. 2.

[27] EPA Proposed Rule on Protection of Stratospheric Ozone, 52 *Fed. Reg.* 47,489 (1987) (to be codified at 40 C.F.R. pt. 82) (proposed Dec. 14, 1987). The ozone layer acts as a shield to harmful ultraviolet radiation, and the direct effects of worldwide ozone depletion on Americans are enormous. *Id.*

[28] *See, e.g.*, Clairborne, *Rare Trout Reintroduced to Dead Lake*, Wash. Post, June 5, 1990, at A21; Gallob, *Birth of the North*

tems and lead to fundamental changes in fisheries and local climates.[29] Extinctions caused by the eradication of the tropical and subtropical rain forests may preclude scientists from producing drugs that have proven effective in treating cancer, malaria, eye diseases, and other ailments.[30] The loss of other plant species endangers agronomists' efforts to produce higher-yielding and disease-resistant varieties of crops such as corn, rice, and wheat.[31]

The protection of endangered species is a closely related concern that also transcends national boundaries. Endangered species migrate freely across long distances, with no respect for national boundaries. Many of the animals on the endangered species list issued by the Secretary live, at different times, in both the United States and foreign countries. Species such as the gray whale, whooping crane, and peregrine falcon all regularly migrate between the United States or its waters and foreign countries or their waters.[32] The global nature of environ-

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American Trans-boundary Environmental Plaintiff, 15 Harv. Envtl. L. Rev. 85 (1991). Similarly, acid rain from pollution sources in Mexico may affect lakes, rivers and other habitats in the U.S. *See Acid Rain in the West*, N.Y. Times, Oct. 7, 1986, at C3, col. 5.

[29] The theory of global warming is that the recent rapid increase in the amount of carbon dioxide in the earth's atmosphere (a total increase of at least 25% has already taken place) will change our planet's equilibrium temperature. If current technological and economic trends continue, it is considered "all but certain" that noticeable global warming will occur. *See* Rathjens, "Energy and Climate Change," in *Preserving the Global Environment* 154, 167, 184 (J. Mathews ed. 1991).

[30] *See Drug Store News*, Vol. 13, No. 9, at 64 (1991).

[31] P. Erlich & E. Wilson, *Biodiversity Studies: Science and Policy*, 253 Science 758, 760 (Aug. 16, 1991).

[32] Moreover, non-migratory endangered species such as the Everglades kite, American crocodile, and West Indian manatee are found both in the United States and in other countries. Federal agency actions that reduce the range of such species outside the United

mental problems means that the Court cannot presume that when the political branches legislate on environmental issues, they retain a parochial domestic focus.

Moreover, the political branches acted against the backdrop of a long history of involvement in global environmental issues when they passed the Endangered Species Act. The United States has demonstrated its concern about global environmental problems—especially concerning wildlife—in a series of international agreements. The Endangered Species Act itself was enacted to implement one of the major international wildlife treaties, the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES").[33] The treaty commits its signatories to protect endangered species throughout the world.

The Endangered Species Act identifies a variety of treaties besides CITES in which the United States has pledged to conserve endangered species. 16 U.S.C. § 1531 (a)(4). The Act states that one of its primary purposes was the achievement of the goals of those treaties and conventions. These treaties, dating back to 1916, obligate the United States to preserve and protect migratory birds through the regulation of hunting, the establishment of refuges, and the protection of bird habitats. The United States has also signed bird protection treaties with neighbors including Canada, Mexico, Japan, and the Soviet Union.[34] In another series of international conventions,

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States mean that the burden of preventing the extinction of those species will fall disproportionately on this country.

[33] *Done* March 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243, *amended* June 22, 1979, see U.S. Dep't of State, *Treaties in Force* 295 (1990).

[34] *See* Convention for the protection of Migratory Birds, Aug. 16, 1916, United States-Great Britain, 39 Stat. 1702, T.S. No. 628; Convention for the Protection of Migratory Birds and Game Mam-

the United States has pledged to protect fish and other living resources on the high seas.[35] These conventions protect the harvest of salmon and tuna, and limit the capture of whales.

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mals, Feb. 7, 1936, United States-Mexico, 50 Stat. 1311, T.S. No. 912; Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, Mar. 4, 1972, United States-Japan, 25 U.S.T. 3331, T.I.A.S. No. 7990; Convention Concerning the Conservation of Migratory Birds and Their Environment, Nov. 19, 1976, United States-USSR, 29 U.S.T. 4647, T.I.A.S. No. 9073.

In the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, *opened for signature* Oct. 12, 1940, 56 Stat. 1354, 1356, T.S. No. 981, 161 U.N.T.S. 193, 194, the governments of North and South America (including the United States) have agreed to "protect and preserve in their natural habitat representatives of all species and genera of their native flora and fauna, including migratory birds, in sufficient numbers and over areas extensive enough to assure them from becoming extinct through any agency within man's control[.]"

[35] America's international commitments in this area include the following: Convention on Fishing and Conservation of the Living Resources of the High Seas, *done* Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285; Amended Agreement for the Establishment of the Indo-Pacific Fisheries Council, *approved* Nov. 23, 1961, 13 U.S.T. 2511, T.I.A.S. No. 5218, 418 U.N.T.S. 348; Convention for the Establishment of an Inter-American Tropical Tuna Commission, May 31, 1949, 1 U.S.T. 230, T.I.A.S. No. 2044, 80 U.N.T.S. 3; Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, 4 U.S.T. 380, T.I.A.S. No. 2786, 205 U.N.T.S. 65; Memorandum of Understanding Concerning Salmonid Research and Enforcement of the International Convention for the High Seas Fisheries of the North Pacific Ocean, Apr. 9, 1986, *see* U.S. Dep't of State, *Treaties in Force* 319 (1990); Convention for the Conservation of Atlantic Tunas, *done* May 14, 1966, 20 U.S.T. 2887, T.I.A.S. No. 6767, 673 U.N.T.S. 63; Convention for the Conservation of Salmon in the North Atlantic Ocean, *opened for signature* Oct. 1, 1983, T.I.A.S. No. 10789; and, Treaty on Fisheries, Apr. 2, 1987, *see* U.S. Dep't of State, *Treatigs in Force* 319 (1990).

The treaties governing the protection of wildlife are only one part of the United States' concern about global environmental problems. The 1909 Boundary Waters Treaty, aimed at water pollution, was one of the earliest bilateral efforts at international environmental cooperation.[36] In 1979, the U.S. recognized the international problem of acid rain by becoming one of thirty-five signatories to the Convention on Long-Range Transboundary Air Pollution.[37] Similarly, the United States and other countries acted on a global scale to address the problem of ozone depletion.[38] In 1988, representatives from thirty countries, including the U.S., agreed to begin drafting a global warming treaty, which is hoped to be completed in

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[36] Treaty Relating to Boundary Waters, Jan. 11, 1909, United States-Great Britain, 36 Stat. 2448, T.S. No. 548. Subsequent agreements include the Agreement on Great Lakes Water Quality, Apr. 15, 1972, United States-Canada, 23 U.S.T. 301, T.I.A.S. No. 7312; Agreement on Great Lakes Water Quality, Nov. 22, 1978, United States-Canada, 30 U.S.T. 1383, T.I.A.S. No. 9257; and the Agreement Amending the Agreement on Great Lakes Water Quality, Oct. 16, 1983, United States-Canada, T.I.A.S. No. 10798.

[37] *Done* Nov. 13, 1979, 34 U.S.T. 3043, T.I.A.S. No. 10541. The Convention committed its signatories to reduce air pollution emissions, stimulate national pollution reduction efforts, increase cooperation and consideration among countries, and create a framework for addressing international environmental issues. The United States has adopted two protocols to the Convention: the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution, *done* Sept. 24, 1984, 27 I.L.M. 698, and the Protocol Concerning the Control of Emissions of Nitrogen Oxides or Their Transboundary Fluxes, Nov. 1, 1988, 28 I.L.M. 212. In addition, the United States has signed a separate agreement with Canada on air pollution: Memorandum of Intent Concerning Transboundary Air Pollution, Aug. 5, 1980, United States-Canada, 32 U.S.T. 2521, T.I.A.S. No. 9856.

[38] The Protocol on Substances that Depiete the Ozone Layer, *opened for signature* Sept. 16, 1987, 26 I.L.M. 1541. The Protocol supplements the Vienna Convention for the Protection of the Ozone Layer, *opened for signature* March 22, 1985, 26 I.L.M. 1516.

time for consideration at the 1992 United Nations Conference on Environment and Development in Brazil.[39]

Given this long history of international treaties on environmental matters—all ratified by Congress, and many specifically referenced in the Endangered Species Act itself—it simply does not make sense to presume that the political branches of government are concerned only about domestic matters when they consider environmental legislation. As discussed above, this conclusion is reinforced by the inherently global nature of environmental issues. Moreover, given the pervasive international focus of the Endangered Species Act itself,[40] the Court can and should presume that all sections of the Act apply extraterritorially unless they specifically state otherwise.[41]

C. This Court Has Evaluated Each Area of Law Separately Before Deciding to Presume that U.S. Laws in that Area Apply Only Within U.S. Territory

The Secretary relies on cases holding, in some areas of law, that there is a presumption that U.S. statutes are

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[39] *See* Chayes, "Managing the Transition to a Global Warming Regime or What to Do til the Treaty Comes," in *Greenhouse Warming: Negotiating a Global Regime* 61 (World Resources Institute ed. 1991).

[40] *See* Note, *The International Applicability of Section 7 of the Endangered Species Act of 1973*, 29 Santa Clara L. Rev. 171 (1989) (concluding that § 7 should have extraterritorial application); *see generally* G. Born & D. Westin, *International Civil Litigation In United States Courts* ch. 7B (1989).

[41] Section 9(a)(1)(B) of the Endangered Species Act in fact limits the prohibition on when one may "take" endangered or threatened species to takings within the United States or its territorial sea; Section 9(a)(1)(C) imposes a similar prohibition on high seas takings. 16 U.S.C. § 1538(a)(1)(B)-(C). This suggests that when the Act means to limit itself to domestic or high seas applications, it says so specifically. Where, as in Section 7, no such limitation appears, the Act is meant to apply without geographic limitation.

not intended to apply abroad.[42] At one time the presumption applied broadly in U.S. law,[43] but it has been significantly narrowed in more recent cases. To decline to apply this presumption to the federal environmental laws generally or to the Endangered Species Act in particular would be consistent with precedent in numerous areas of law.

Many areas of U.S. law illustrate the facts that: (1) the political branches have concerned themselves with conduct abroad, and (2) the U.S. courts have made an area-by-area determination whether a presumption against extraterritoriality is appropriate. For instance in the area of antitrust, this Court overruled its holding in *American Banana*, and has applied U.S. laws extraterritorially to encompass a wide range of conduct occurring solely or mostly in foreign jurisdictions. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1962); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927).[44]

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[42] *See Aramco*, 111 S. Ct. 1227 (presumption applies in employment discrimination case); *Foley Bros.*, 336 U.S. 281 (same, in labor case). *But see, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) (declining to apply presumption in antitrust case).

[43] *See, e.g.*, J. Story, *Commentaries on the Conflict of Laws* § 539 (7th ed. 1872); H. Wheaton, *Elements of International Law* §§ 77, 111-14, 134-51 (1866).

[44] This Court recently characterized *American Banana* as having been "substantially overruled" by *Continental Ore. W.S. Kirkpatrick v. Environmental Tectonics Corp.*, 110 S. Ct. 701, 705 (1990). Likewise, this Court has repeatedly cited with approval the Second Circuit's decision in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), holding that the Sherman Act applies to conduct abroad that has effects within the United States. *See Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 704-05 (1962); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 n.16 (1952); *Zenith Radio Corp. v. Hazeltine Research Corp.*, 395 U.S. 100, 114 n.8 (1969). *Accord* Restatement (Third) Foreign Relations Law § 415; U.S. Dep't of Justice, *Antitrust Enforcement Guidelines for International Operations* 29-34 (1988).

The federal courts have applied domestic law extraterritorially in many other instances where the governing statutes speak in jurisdictional terms much less specific than the Endangered Species Act.[45] For instance, this Court interpreted the Jones Act to apply extraterritorially in *Lauritzen v. Larsen*, 345 U.S. 571, 576-77 (1953), where the United States has the predominant interest in the acts at issue.[46] The Lanham Act is worded broadly and makes no specific reference to conduct occurring abroad. Nonetheless, this Court held in *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), that the Lanham Act applies extraterritorially to prevent trademark infringement abroad that has effects in this country. Similarly, U.S. patent law has been held to apply extraterritorially to prevent infringing effects in the United States,[47] as has U.S. copyright law,[48] though neither statute contains an explicit declaration to that effect.

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[45] By contrast, Endangered Species Act § 3(9) contains one of the broadest definitions of "foreign commerce" covered by the Act anywhere in federal law: "The term 'foreign commerce' includes, among other things, any transaction—(A) between persons within one foreign country; (B) between persons in two or more foreign countries; (C) between a person within the United States and a person in a foreign country; or (D) between persons within the United States, where the fish and wildlife in question are moving in any country or countries outside the United States." 16 U.S.C. § 1532(9).

[46] Using the balancing formula set forth in the decision, the *Lauritzen* Court declined to exercise jurisdiction over the particular transaction at issue. 345 U.S. at 583-93. However, in another case this Court found that the same factors weighed in favor of the extraterritorial exercise of Jones Act jurisdiction. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970).

[47] *See Spindelfabrik Suessen-Schurr v. Schubert & Salzer Maschinfabrik Aktiengesellschaft*, 903 F.2d 1568, 1577 (Fed. Cir. 1990) (sustaining injunction requiring foreign defendant to label all machines sold anywhere in the world as: "Not available for sale, use or delivery to the United States").

[48] *See Update Art, Inc. v. Modiin Pub., Ltd.*, 843 F.2d 67 (2d Cir. 1988); *Peter Starr Prod. Co. v. Twin Continental Films, Inc.*, 783 F.2d 1440 (9th Cir. 1986).

The federal securities laws are couched in general terms that do not specifically refer to conduct occurring in foreign states. But it is well-established that the securities laws are applicable extraterritorially to foreign conduct.[49] Like the securities laws, the U.S. commodities laws have routinely been held to apply extraterritorially.[50]

The courts have held that generally worded federal narcotics and other criminal statutes apply outside the United States.[51] The United States exercises extraterri-

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[49] *See* Restatement (Third) Foreign Relations Law § 416, comment a; *SEC v. Tome*, 833 F.2d 1086, 1087-88 (2d Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988); *SEC v. Certain Unknown Purchasers*, 817 F.2d 1018 (2d Cir. 1987), *cert. denied*, 484 U.S. 1060 (1988); *SEC v. Vaskevitch*, 657 F. Supp. 312 (S.D.N.Y. 1987); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981); *see also SEC v. Minas de Artemisa, S.A.*, 150 F.2d 215 (9th Cir. 1945).

Dozens of lower court decisions have applied the securities laws extraterritorially in private actions. *See, e.g., Grunenthal GmbH v. Hotz*, 712 F.2d 421, 425 (9th Cir. 1983); *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409 (8th Cir. 1979); *Schoenbaum v. Firstbrook*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969); *cf. Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 30-31 (D.C. Cir. 1987).

[50] *See, e.g., Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103 (7th Cir.), *cert. denied*, 469 U.S. 871 (1984); *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041 (2d Cir. 1983); *Transnor (Bermuda) Ltd. v. B.P. North America Petroleum*, 738 F. Supp. 1472 (S.D.N.Y. 1990).

[51] *E.g., Kawakita v. United States* 343 U.S. 717 (1952); *United States v. Bowman*, 260 U.S. 94 (1922); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820); *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991); *United States v. Wright-Barker*, 784 F.2d 161 (3d Cir. 1986); *United States v. Baker*, 609 F.2d 134 (5th Cir. 1980); *United States v. Brown*, 549 F.2d 954 (4th Cir.), *cert. denied*, 430 U.S. 949 (1977); *cf. Blackmer v. United States*, 284 U.S. 421 (1932) (sustaining extraterritorial subpoena to require U.S. citizen to appear at criminal trial).

torial jurisdiction to impose taxes.[52] To adopt the government's position in this case—that no U.S. statute on any subject applies extraterritorially unless it contains a specific statement to that effect—would endanger important federal civil and criminal enforcement efforts in numerous areas.[53]

The Secretary—while barely acknowledging the broad range of laws applying extraterritorially, Br. at 33 n.21—infers a rigid presumption from a line of cases beginning with *Foley*, and ending with this Court's decision in *Aramco*, 111 S. Ct. 1227.[54] Each of these cases applies a presumption against extraterritoriality in the context of statutes regulating labor and employment.[55] However,

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[52] Restatement (Third) Foreign Relations Law §§ 411-12; *Cook v. Tait*, 265 U.S. 47 (1924).

[53] Indeed, just last term in the *Aramco* case the government took the position that the presumption of territoriality was substantially more limited than the position it urges here. *See* Brief for the EEOC at 8-10.

[54] The other two cases in that line of authority, *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10 (1963), and *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), provide the government little support. Although both cases discuss the presumption against extraterritoriality, both involve disputes between foreign seamen and their foreign employer while docked at a *United States* port. The ultimate rationale for decision in both cases was legislative history of the statutes at issue declaring that the statutes were meant to protect "American workingmen" rather than aliens. *McCulloch*, 372 U.S. at 20; *Benz*, 353 U.S. at 144. Because they involve actions in the United States, neither case is properly understood as raising extraterritoriality issues. Rather, each is a case where the Court declined to exercise jurisdiction where it undoubtedly could have done so, out of concern for comity with other nations that had a greater interest in the disputes at issue.

[55] *Foley* involved the "Eight-Hour Law"; *Aramco* involved the employment discrimination provisions in Title VII of the 1964 Civil Rights Act; *McCulloch* and *Benz* involved the National Labor Relations Act.

labor and employment are traditionally local concerns, and have rarely been the subject of extraterritorial legislation by any country. To seek to regulate workplace conditions and the duties of employers in another country would present a serious danger of conflict with that country's laws.[56] The Restatement (Third) Foreign Relations Law of the United States (1986) generally does not recognize a presumption against extraterritoriality.[57] But the Restatement does conclude that U.S. extraterritorial jurisdiction is limited "over predominantly local activities, such as industrial and labor relations[.]" *Id.* at § 414 comment c.

Aramco, an employment law case on which the government places the greatest weight, is inapposite. In *Aramco*, the statute at issue defined the "commerce" covered by the

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[56] Section 7 presents a much less significant risk of conflicts, because it only regulates the activities of the U.S. government and has effect in foreign countries only if they choose to accept U.S. aid. By contrast, in many of the areas discussed above such as antitrust or securities law in which U.S. law is applied extraterritorially, U.S. law declares illegal acts done by private parties in foreign countries, even though those acts may be permissible under the home countries' laws.

[57] The Restatement (Third) discussed its decision to omit a presumption that U.S. statutes apply only domestically:

> In the past, the jurisdiction of a state to make its law applicable in a transnational context was determined by formal criteria supposedly derived from concepts of state sovereignty and power. . . . Increasingly, the practice of states has reflected conceptions better adapted to the complexities of contemporary international intercourse. . . . Territoriality and nationality remain the principal bases of jurisdiction to prescribe, but in determining their meaning rigid concepts have been replaced by broader criteria[.]

Id. at 235-37. Among other permissible bases of jurisdiction, Restatement § 402(2) allows the United States to regulate the conduct of its nationals, and Restatement § 402(1)(C) allows the United States to regulate based on effects within this country of activity abroad.

act with boilerplate language borrowed from statutes never held to apply extraterritorially.[58] Here, Endangered Species Act Section 3(9) carefully defines "foreign commerce" in a way that leaves no doubt as to its extraterritorial effect.[59] The statute in *Aramco* had numerous procedural indications that it was intended to apply only in the United States.[60] Here, several provisions of Endangered Species Act Section 7 indicate that the political branches anticipated and squarely addressed its application outside this country.[61]

The presumption against extraterritorality applied in the *Foley-Aramco* line of cases is appropriate in the field of labor and employment. In contrast, as demonstrated above, that presumption is not appropriate in the environmental area. In environmental cases, the Court should assume (as it does in many other areas) that the political branches legislate against the background of choice-of-law and public international law principles. Those principles allow the United States to regulate its own nationals and to regulate activities abroad with an effect in this country. Where (unlike here) there is an actual conflict with the laws of another sovereign with a greater interest in the

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[58] 111 S. Ct. at 1231-32.

[59] *See* n.45 *supra*.

[60] 111 S. Ct. at 1234.

[61] *See, e.g.*, § 7(n) (granting judicial review for agency actions "outside of any circuit," and granting standing to seek judicial review to any "person," defined in § 3(13) to include foreign governments); § 7(i) (State Department consultation on exemptions affecting treaty obligations); § 7(j) (granting exemptions where necessary for national security).

As discussed below, another distinction between *Aramco* and this case is that in *Aramco*, the agency charged with enforcing the statute originally interpreted it to apply only domestically, 111 S. Ct. at 1235, while the contemporaneous interpretation of Section 7 by the agencies charged with enforcing it held that Section 7 does apply to agency action outside the United States.

transaction, U.S. courts may decline to exercise jurisdiction under a comity analysis.[62] Interpreted against this background, the Court should not presume that U.S. environmental laws apply only domestically.

The Secretary argues, citing *Aramco*, Br. at 33, that respondents must demonstrate a "clear statement" that Section 7 applies outside the United States. The Secretary concedes, Br. at 39-41, that parts of the Endangered Species Act do apply extraterritorially, and the Secretary cites no authority for requiring a "clear statement" in every section of an act that concededly applies extraterritorially at least in part. We respectfully suggest that the "clear statement" hurdle need only be crossed for the Act as a whole. In any event, the use of the terms "endangered species" and "threatened species" in Section 7—terms that concededly apply extraterritorially[63]—establishes the requisite clear statement that the section apply overseas.[64]

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[62] *See* Restatement (Third) § 403; *Timberlane Lumber Co. v. Bank of American N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976), *aff'd after remand*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985). This comity approach avoids serious conflicts with foreign law where they actually occur, but allows the United States to vindicate important interests abroad when no conflict exists, or when the U.S. interest outweighs the foreign interest. Such a "particularized analysis of the respective interests of the foreign nation and the requesting nation" was exactly the method this Court recently set forth for determining when to allow direct extraterritorial discovery under the Federal Rules of Civil Procedure. *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522, 543-44 (1987).

[63] Indeed, of the 1137 species listed under the Act on May 31, 1991, 522 are found exclusively outside this country. U.S. Fish and Wildlife Service, Endangered Species Technical Bulletin, vol. XVI, No. 6, June 1991 at 12.

[64] *See also supra* n.61 (listing procedural indications that Section 7 applies abroad).

III. THE SECRETARY'S OWN REGULATION ALREADY RECOGNIZES THAT SECTION 7 APPLIES TO U.S. AGENCY ACTIONS OUTSIDE THIS COUNTRY'S TERRITORIAL JURISDICTION

Even if a presumption against extraterritoriality were applied to this case, the Secretary, by virtue of his own regulations, concedes that Section 7 is properly interpreted to apply outside the territory of the United States. The regulation that the Secretary defends here applies, by its own terms, outside the territory of the United States, to the global commons of the high seas.[65]

The high seas, by definiton, are outside the "territorial" limits of any nation.[66] This Court has consistently held that an application of federal statutes to actions occurring on the high seas is an extraterritorial application of U.S. law. *See, e.g., Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989); *Aramco*, 111 S. Ct. at 1235 (treating statutes applying to the high

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[65] Both before and after the 1986 changes to the regulation at issue here, the regulation has applied to agency action affecting the high seas. *Compare* 50 C.F.R. § 402.01(a) (1987) ("Section 7(a)(2) of the Act requires every Federal agency, in consultation with . . . the Secretary, to insure that any action it authorizes, funds, or carries out, *in the United States or upon the high seas*, is not likely to jeopardize the continued existence of any listed species") (emphasis added) *with* 50 C.F.R. § 402.01(a) (1978) ("Section 7(a)(2) requires every Federal agency to insure that its activities or programs, *in the United States, upon the high seas, and in the foreign countries* will not jeopardize the continued existence of listed species") (emphasis added).

[66] *United States v. Louisiana*, 394 U.S. 11, 23 (1969); *United States v. Romero-Galue*, 757 F.2d 1147, 1149 n.1 (11th Cir. 1985). *Accord* Convention on the High Seas, art. 1, *done* Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; United Nations Convention on the Law of the Sea, pt. VII, § 1, art. 86, *opened for signature* Dec. 10, 1982, 21 I.L.M. 1261 (the latter has not yet entered into force).

seas as extraterritorial).[67] In concluding that Section 7 applies extraterritorially to the high seas, the Secretary necessarily discerns that the section contains the requisite indication of extraterritorial intent.[68]

At the very least, the inconsistency of the regulations and the Secretary's position in this Court remove any basis for the government's claim that its revisionist interpretation of Section 7 deserves judicial deference.[69] The irremediable clash between the regulations and the Secretary's brief demonstrates that the government's reading of the statute does not reflect a knowledgeable and careful reading of the Endangered Species Act, but

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[67] *Accord United States v. Wright-Barker*, 784 F.2d 161, 166 (3d Cir. 1986) (applying criminal drug law extraterritorially to conduct on high seas); *Romero-Galue*, 757 F.2d at 1152 n.13 (same); *United States v. Smith*, 680 F.2d 255, 257 (1st Cir. 1982) (same), *cert. denied*, 459 U.S. 1110 (1983). *Compare United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1977). In *Mitchell*, the Fifth Circuit held that the Marine Mammal Protection Act applied to the high seas and not to foreign jurisdictions, because the statute made specific reference to the high seas and not to foreign countries. Of course, there is no similar limiting language in Section 7.

[68] The Secretary apparently believes, Br. at 6, that agency actions affecting the high seas create less potential for conflict with foreign governments than actions affecting foreign territory. This proposition is counter-intuitive—actions that affect the high seas affect each of the scores of nations that use the high seas—and, as demonstrated above, is irrelevant to the question of whether applying Section 7 to the high seas is "extraterritorial."

[69] This Court declined to defer to an agency position concerning extraterritoriality in *Aramco*, 111 S. Ct. at 1235, because, like the Secretary's here, it was neither consistent nor well-reasoned. In *Aramco*, the Court deferred instead to the agency interpretation most nearly contemporaneous with the enactment of the statute, which held that it did not apply abroad. Here, the Secretary's contemporaneous interpretation was that Section 7 *does* apply abroad, and only years later did he change that interpretation (without any claimed basis for the change in his experience applying the statute).

rather a *post hoc* rationalization for its own arbitrary conclusions.

Section 7 of the Endangered Species Act was plainly meant to prevent U.S. agency actions from contributing to the extinction of endangered species anywhere in the world. The Court should reject the Secretary's contention to the contrary.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,
Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF AMICUS CURIAE AMERICAN INSTITUTE OF BIOLOGICAL SCIENCES IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICUS CURIAE AMERICAN INSTITUTE OF BIOLOGICAL SCIENCES IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The American Institute of Biological Sciences (AIBS) is a nonprofit, member-governed national organization whose mission is to address important public policy issues in the life sciences, including environmental, medical and agricultural issues. Founded in 1947 as an operating component of the National Academy of Sciences, AIBS is now an independent federation of 47 scientific societies representing more than 80,000 biologists, students and others concerned with the life sciences.

AIBS provides interdisciplinary advice on topics related to global biological diversity, such as food and fiber production, pest and pathogen management, endangered species protection and habitat preservation, the environmental release of genetically engineered organisms, and the medical use of bioactive compounds. Global biological diversity involves the breadth of the genetic pool crafted by nature over millennia of evolution; the varied plants, animals and microbes that form whole communities; and the range of habitats that stabilize the soil, purify ground water and recycle atmospheric gases.

AIBS seeks to preserve global biodiversity, which is essential not only to scientific and medical research but also to human well-being. AIBS consults with and assists public and private agencies in developing their basic research programs, and serves as a national information center to educate the public as to the importance of global biological diversity.

AIBS files this brief pursuant to Rule 37.3 with the written consents of all parties, which are separately filed.

SUMMARY OF ARGUMENT

Respondents have standing to enjoin the government's violation of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, because they meet Article III injury, traceability and redressability standards. *See, e.g., Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

In enacting the Endangered Species Act, Congress rationally determined, on the basis of persuasive scientific evidence, that loss of worldwide biological diversity results in immediate and direct injury *to all persons.* Congress also found that the actions of federal agencies cause a loss of global biodiversity, and thus constitute a fairly traceable cause of this personal injury. To mitigate such injury, Congress required in Section 7 that federal agen-

cies consult with the Fish and Wildlife Service of the Department of the Interior (FWS) or the National Marine Fisheries Service of the Commerce Department (NMFS) before commencing projects, to ensure that federal actions will not jeopardize endangered species or critical habitat. 16 U.S.C. § 1536(a)(2).

To ensure compliance with Section 7, Congress expressly authorized citizen civil suits, by any person, to enjoin violations of the Act. Section 11(g) provides that "*any person* may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision" of the Act. 16 U.S.C. § 1540(g)(1)(A) (emphasis added).

Thus, in enacting the Endangered Species Act, the Congress has reasonably determined that all persons meet all three of the factual requisites for standing: all persons suffer personal injury from loss of biodiversity; that injury is incontestably traceable to unchecked federal agency actions violative of the Act; and redress results when courts enjoin violations of the Act pursuant to Section 11(g).

Congress's use of "private attorneys general" to assist in enforcement of statutory duties is a well-established, legitimate legislative mechanism. Moreover, Congress's use of such a mechanism in the Endangered Species Act is rationally related to its factual findings: Congress has determined that all persons are injured by a loss of global biodiversity; under Section 11(g), any person may sue to enjoin a violation causing such injury.

The Court may, of course, disregard any congressional finding that is arbitrary or irrational, or invalidate any legislative remedy that violates a fundamental Constitutional right. However, where, as here, Congress has made reasonable factual findings with respect to injury, traceability, and redressability, and has created an enforce-

ment mechanism rationally related to those findings, the Court should accord substantial deference to such findings and to the clear congressional intent to provide for broad citizen enforcement of the Act.

Standing law is "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). Here, the separation of powers principle compels judicial deference to the well-grounded congressional factual findings manifest in the Act. To preserve this principle, the Court should give effect to Section 11(g) as Congress wrote it and affirm respondents' standing to maintain this lawsuit.

ARGUMENT

I. THE ENDANGERED SPECIES ACT ESTABLISHES ALL THREE REQUISITES FOR STANDING

For standing to sue in federal court, a person must show that he or she:

> personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant . . . and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," . . . .

Valley Forge, 454 U.S. at 472 (citations omitted). The Article III test is thus a factual inquiry. In enacting and reauthorizing the Endangered Species Act, Congress made reasonable legislative factual findings, based on overwhelming evidence, that address the three factual requisites of standing.

A. The Loss of Global Biodiversity Injures All Persons

For purposes of standing, the alleged injury must be "distinct and palpable," *Warth* v. *Seldin*, 422 U.S. at 501. Congress has determined, on the basis of relevant scientific evidence, that such injury results to all persons when

endangered species are jeopardized, resulting in a loss of global biodiversity.

In promulgating and reauthorizing the Act, Congress expressly found that global biodiversity is an immensely valuable resource that is rapidly being depleted as the result of human activity. Congress concluded that because this resource is finite and essentially irreplaceable, its depletion causes injury to all persons:

> From all evidence available to us, it appears that the pace of disappearance of species is accelerating. As we homogenize the habitats in which these plants and animals evolved . . . we threaten their—and our own—genetic heritage.
>
> The value of this genetic heritage is, quite literally, incalculable.[1]
>
> * * * *
>
> Consideration of this need to protect endangered species goes beyond the esthetic . . . . [M]any of these animals perform vital biological services to maintain a "balance of nature" within their environments. Also revealed was the need for biological diversity for scientific purposes.[2]
>
> * * * *
>
> From the most narrow possible point of view, it is in the best interests of mankind to minimize the

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[1] House Comm. on Merchant Marine and Fisheries, Endangered and Threatened Species Conservation Act of 1973, H.R. Rep. No. 412, 93d Cong., 1st Sess. 4 (1973), *reprinted in* Senate Comm. on Environment and Public Works, A Legislative History of the Endangered Species Act of 1973, As Amended in 1976, 1977, 1978, 1979, and 1980, 97th Cong., 2d Sess. 143 (1982) [hereinafter 1982 Legislative History].

[2] Senate Comm. on Commerce, Endangered Species Act of 1973, S. Rep. No. 307, 93d Cong., 1st Sess. 2, *reprinted in* 1973 U.S.C.C.A.N. 2989, 2990 and *reprinted in* 1982 Legislative History, *supra* note 1, at 301.

losses of genetic variations. The reason is simple: they are potential resources.[3]

* * * *

[I]t is important to understand that the contribution of wild species to the welfare of mankind in agriculture, medicine, industry, and science have been of incalculable value. These contributions will continue only if we protect our storehouse of biological diversity . . . .

. . . .

[O]ur wild plants and animals are not only uplifting to the human spirit, but they are absolutely essential—as a practical matter—to our continued healthy existence.[4]

Congress promulgated the Act because of the injury suffered by all persons when global biodiversity is lost:

The ultimate goal of the Endangered Species Act is to maintain a diversity of species and to preserve in their natural ecosystems both endangered and threatened species.[5]

* * * *

[M]uch of the criticism directed against the Endangered Species Act is based on the belief that the

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[3] House Comm. on Merchant Marine and Fisheries, Endangered and Threatened Species Conservation Act of 1973, H.R. Rep. No. 412, 93d Cong., 1st Sess. 5 (1973), *reprinted in* 1982 Legislative History, *supra* note 1, at 144.

[4] 128 Cong. Rec. 26,189 (1982) (statement of Rep. Evans). *See also* 119 Cong. Rec. 30,162 (1973) (statement of Rep. Sullivan), *reprinted in* 1982 Legislative History, *supra* note 1, at 192-93.

[5] Senate Comm. on Commerce, Endangered Species Act of 1973 Reauthorization, S. Rep. No. 837, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1982 Legislative History, *supra* note 1, at 518. *See also* House Comm. on Merchant Marine and Fisheries, Endangered Species Act Authorization, H.R. Rep. No. 887, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1982 Legislative History, *supra* note 1, at 496.

> act puts the interests of "obscure" species ahead of the interests of man. That belief is erroneous. What the act really puts foremost is the long-term interest of human welfare—and the necessity that mankind is entitled to a habitable environment. This necessitates having a diverse pool of genetic resources to tap for medical, scientific, economic and other purposes.[6]
>
> * * * *
>
> I think we all understand the importance of continued support for the Endangered Species Act. It remains the Nation's—indeed the world's—most important law for the preservation of biological diversity.[7]

In short, Congress found that all persons are "distinctly and palpably" injured by the loss of global biodiversity. The fact that this personal injury is suffered by everyone does not lessen it or mitigate its sufficiency for Article III standing. "[T]he fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Sierra Club* v. *Morton*, 405 U.S. 727, 734 (1972). *See also United States* v. *SCRAP*, 412 U.S. 669, 686 (1973).[8]

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[6] 124 Cong. Rec. 38,126 (1978) (statement of Rep. Dingell), *reprinted in* 1982 Legislative History, *supra* note 1, at 809.

[7] 133 Cong. Rec. 5,030 (1987) (statement of Sen. Moynihan). *See also* 128 Cong. Rec. 12,958 (1982) (statement of Rep. Forsythe).

[8] Any "prudential" concern about exercising jurisdiction over a "'generalized grievance' shared in substantially equal measure by all or a large class of citizens," *Warth* v. *Seldin*, 422 U.S. at 499, is eliminated when the suit is brought pursuant to statutory authorization. *Id.* at 501. *See also Gladstone, Realtors* v. *Bellwood*, 441 U.S. 91, 100 (1979); *Bread Political Action Committee* v. *Federal Election Commission*, 455 U.S. 577, 584 (1982); *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 372 (1982). Moreover, respondents also assert injury to their aesthetic and professional interests—as well as injury from the loss of global biodiversity.

This congressional finding of injury was based on persuasive scientific evidence.[9] It accords with a broad consensus in the scientific community that global biological diversity has incalculable value and that all persons are injured when that diversity is threatened. For example, a 1990 report by the Science Advisory Board to the Environmental Protection Agency concludes that "Species Extinction and Overall Loss of Biological Diversity" is one of the four highest-risk environmental problems facing the world.[10] A 1989 report commissioned by the National Science Foundation concludes that:

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[9] Typical of the extensive scientific testimony that Congress considered in making its factual determinations is that of Dr. Thomas Eisner, Division of Biological Sciences, Cornell University:

> It has been estimated that fully 40% of all prescriptions written in the United States contain as their chief ingredients compounds derived from plants, including lower plants. It was through exploration of nature that these drugs were discovered. . . . [M]any of the most interesting plant drugs in current use were only recently discovered, including for example some of the antileukemic compounds, and anticancer drugs such as vincristine. used in the treatment of Hodgkin's disease. There is no end to the potential for discovery in nature, because we have only begun the chemical exploration of nature.

Endangered Species Act Oversight: Hearings Before the Subcom. on Environmental Pollution of the Senate Comm. on Environment and Public Works, 97th Cong., 1st Sess. 368 (1981). *See also id.* at 366 (statement of Edward O. Wilson, Baird Professor of Science, Harvard University); *Endangered Species Conservation Act of 1972: Hearings on S. 249, S. 3199 and S. 3818 Before the Subcomm. on the Environment of the Senate Comm. on Commerce*, 92d Cong., 2d Sess. 146-49 (1972) (statement of Dr. F. Raymond Fosberg, botanist).

[10] EPA Science Advisory Board, *Reducing Risk: Setting Priorities and Strategies for Environmental Protection* 13 (1990). This report was prepared by a special committee of the Science Advisory Board, "composed of 39 distinguished scientists and other experts from academia, state government, industry, and public interest groups." *Id.* at ii.

> We are at a critical juncture for the conservation and study of biological diversity: such an opportunity will never occur again. Understanding and maintaining that diversity is the key to humanity's continued prosperous and stable existence on Earth.
>
> The extinction event that we are witnessing is the most catastrophic loss of species in the last 65 million years . . . .
>
> . . . .
>
> The loss of biological diversity is important because human existence depends on the biological resources of the earth. Human prosperity is based very largely on the ability to utilize biological diversity: to take advantage of the properties of plants, animals, fungi, and microorganisms for food, clothing, medicine, and shelter.[11]

The Council on Environmental Quality agrees that preserving biodiversity yields "practical and tangible benefits" for each of us.[12] The NMFS warns that effective enforcement of the Act is necessary "to preserve the world's genetic heritage for future generations." [13] The

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[11] Committee on International Science, Task Force on Global Biodiversity, National Science Board, *Loss of Biological Diversity: A Global Crisis Requiring International Solutions* 1 (1989).

[12] *Hearings on H.R. 2082 and H.R. 858 Before the Subcomm. on Environment of the House Comm. on Science, Space and Technology*, 102d Cong., 1st Sess. (1991) (unpublished statement of Michael R. Deland, Chairman, Council on Environmental Quality, Executive Office of the President, p. 4).

[13] "Preserving such species and their ecosystems is important for maintaning genetic diversity, which provides living organisms with the capability to acclimate and adapt to a changing physical environment. Effective implementation of the Endangered Species Act must continue if we are to preserve the world's genetic heritage for future generations." *Endangered Species Act: Hearings on Endangered Species Act Reauthorization and Oversight Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 97th Cong., 2d Sess. 474 (1982) (statement of William H. Steven-

Department of State agrees that each of us has an "explicit interest" in protecting the "global stock of irreplaceable genetic material":

> Recent well publicized break-throughs in genetic engineering may be what is required to focus public attention on *the explicit interest each one of us has* in seeing that the global stock of irreplaceable genetic material isn't squandered. This may help us focus attention on the practical need to conserve our biological resources.[14]

Thus the Endangered Species Act is based on a rational congressional finding—indeed, a universally shared scientific judgment—that global biodiversity bestows practical and tangible benefits to all persons, and therefore the loss of global biodiversity causes "distinct and palpable" injury to all persons. That injury, obvious to the world's scientific community, constitutes injury for purposes of the Article III standing test.

B. Federal Agency Action is a Traceable Cause of This Injury

The second factual prong of the standing test is traceability, that is, a "causal connection between the assertedly unlawful conduct and the alleged injury." *Allen* v. *Wright*, 468 U.S. 737, 753 n.19 (1984). In promulgating the Endangered Species Act, Congress found that ill-

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son, Deputy Administrator for Fisheries, National Marine Fisheries Service).

[14] Agency for International Development, Department of State, Department of Agriculture, Department of Commerce, Department of the Interior, Council on Environmental Quality, Smithsonian Institution, National Science Foundation, and the U.S. Man and the Biosphere Program, *Proceedings of the U.S. Strategy Conference on Biological Diversity* 10 (1981) (statement of James L. Buckley, Under Secretary of State for Security Assistance, Science and Technology, U.S. Department of State), *reprinted in Endangered Species Act Oversight: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 97th Cong., 1st Sess. 303 (1981) (emphasis added).

considered action of federal agencies—action taken without prior consultation with FWS or NMFS—is a significant cause of the loss of global biodiversity, and thus injury to all. This finding is evident from the inclusion of Section 7 in the Act, which mandates consultation with FWS or NMFS:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species . . . .

16 U.S.C. § 1536(a)(2). Section 7 has been called the "most important" aspect of the Act—indeed, its "heart." [15] Congress has found that the consultation process has been effective in modifying agency action and mitigating the loss of global biodiversity.[16] The Executive Branch agrees.[17]

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[15] The consultation process is "one, if not the most important, aspect of the act." 124 Cong. Rec. 21,148 (1978) (statement of Sen. Chafee), *reprinted in* 1982 Legislative History, *supra* note 1, at 996. "The heart of the 1973 act is section 7." 124 Cong. Rec. 21,142 (1978) (statement of Sen. Nelson), *reprinted in* 1982 Legislative History, *supra* note 1, at 982.

[16] *See, e.g.*, House Comm. on Merchant Marine and Fisheries, Endangered Species Act Amendments, H.R. Rep. No. 567, 97th Cong., 2d Sess. 24, *reprinted in* 1982 U.S.C.C.A.N. 2807, 2824; 124 Cong. Rec. 38,126 (1978) (statement of Rep. Dingell), *reprinted in* 1982 Legislative History, *supra* note 1, at 809.

[17] *Endangered Species Act: Hearings on Endangered Species Act Reauthorization and Oversight Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 97th Cong., 2d Sess. 229, 349, 528 (1982) (statements of Ronald Lambertson, Associate Director, Federal Assistance, U.S. Fish and Wildlife Service, Department of the Interior; Richard Roe, Acting Director, Office of Marine Mammals and Endangered Species, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce; issue papers of Dr. Eugene Hester,

The Court has set a "substantially likely" standard of proof of causation in the standing context. *Duke Power* v. *Carolina Environmental Study Group*, 438 U.S. 59, 74-75 (1978). Here, where the injury results from loss of global biodiversity, it is not necessary to show that respondents will be injured by a particular federal agency action endangering a particular species on a particular plot of land. Congress has clearly and reasonably determined that *any* federal agency action subject to Section 7 taken without consultation will likely lead to a reduction in the net variety of species globally, and thus cause "distinct and palpable" injury.

C. Compliance with Section 7 of the Act Redresses This Injury

The third factual prong of the standing test "examines the causal connection between the alleged injury and the judicial relief requested." *Allen* v. *Wright*, 468 U.S. at 753 n.19. Here the connection could not be clearer: if injury occurs as a result of the failure of federal agen-

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Deputy Director, U.S. Fish and Wildlife Service, Department of the Interior); *Endangered Species Act Oversight: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 97th Cong., 1st Sess. 76-77 (1981) (statement of Robert Jantzen, Director, U.S. Fish and Wildlife Service, Department of the Interior); *Endangered Species Act: Hearings on H.R. 1027 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 99th Cong., 1st Sess. 18, 26 (1985) (statements of Robert Jantzen, Director, U.S. Fish and Wildlife Service, Department of the Interior; William Gordon, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, U.S. Department of Commerce); *Reauthorization of the Endangered Species Act: Hearings on S. 675 Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works*, 100th Cong., 1st Sess. 16-17, 88 (1987) (statements of Frank Dunkle, Director, U.S. Fish and Wildlife Service; William Evans, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, U.S. Department of Commerce).

cies to consult with FWS and NMFS—the federal experts on endangered species and habitat—that injury is cured when Section 7 consultations are conducted.

Congress has found the Section 7 consultative process to be effective in minimizing the adverse impact of federal agency action on endangered species, and hence on global biodiversity. *See supra* p. 11. The Section 7 consultative procedure is no mechanical formality.[18] Agencies follow the recommendations of FWS or NMFS in the vast majority of cases. *See, e.g.*, H.R. Rep. No. 467, 100th Cong., 1st Sess. 4 (1987). In fact, an agency which ignores a "jeopardy opinion" can be compelled to modify its actions. *See, e.g., TVA* v. *Hill*, 437 U.S. 153 (1978).

Plaintiff need only show a "substantial likelihood" that the relief requested will redress the injury claimed. *Duke Power*, 438 U.S. at 75. The joint regulations challenged in this lawsuit fail to require federal agencies to consult with FWS and NMFS about the overseas effects of their actions. Compelling the Department to amend its regulations will surely result in such consultation in compliance with Section 7, and thus in less loss of global biodiversity, and thus in less injury to respondents and others.[19] Therefore, an injunction directing petitioner

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[18] Petitioner argues that respondents' injury is not redressable because FWS and NMFS recommendations are not binding on action agencies. *See* Petitioner's Brief at 25. However, this argument ignores the explicit requirements of Section 7. Agencies are forbidden to "make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures" formulated by the Secretary of Interior during Section 7 consultations. 16 U.S.C. § 1536 (d). Furthermore, there would be no reason for the extensive exemption procedures in Section 7(e)-(p) if an agency could simply ignore the recommendations of FWS or NMFS. 16 U.S.C. § 1536(e)-(p).

[19] Petitioner argues that respondents' injury is not redressable because some agency actions are part of multi-donor international

Secretary of Interior to comply with Section 7, and consult with other federal agencies concerning the overseas effects of their actions, is "substantially likely" to redress respondents' injury as defined by the Act.

II. SEPARATION OF POWERS COMPELS JUDICIAL DEFERENCE TO THE DETERMINATION BY CONGRESS IN SECTION 11(g) THAT ALL PERSONS MAY ENFORCE THE ACT

"[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen* v. *Wright*, 468 U.S. at 752. Standing limits are designed to assure that courts do not intrude upon matters within the Constitutional ambit of the Legislature or the Executive—to prevent an "overjudicialization of the processes of self-governance." [20] Standing law is thus perverted when invoked by the courts to amend a statute judicially or to bar the Legislature from doing what it clearly and validly intended to do by statute.

Here petitioner asks the Court to rewrite Section 11(g) of the Act, in the name of separation of powers. Section 11(g), the "citizen suits" provision of the Act, provides for enforcement suits by "any person":

> [A]ny person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality

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development projects. *See* Petitioner's Brief at 26-27. However, one need look no further than footnote 12 of petitioner's brief for proof that agencies are quite capable of working with the host government or other donors to change a project to minimize any adverse impacts on biodiversity. Petitioner describes how A.I.D. influenced the governments of Sri Lanka and Peru to modify original project designs to minimize adverse effect on biodiversity. Petitioner also concedes that A.I.D. found it useful to confer with FWS in its attempt to reduce such adverse effect. *Id.* at 22.

[20] Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881 (1983).

> or agency . . . who is alleged to be in violation of any provision of [the Act] . . . .

16 U.S.C. § 1540(g)(1)(A). The plain language of Section 11(g) surely constitutes a legislative decision that a violation of the Act, such as a violation of Section 7 by the Secretary of Interior, should be enjoined by the Courts in response to a complaint by "any person".[21] Congress provided this private enforcement to ensure that the important public purpose of the Endangered Species Act would be fulfilled. Nullification of Section 11 would result in *pro tanto* nullification of Section 7, since the government is unlikely to challenge its own failure to obey Section 7.

Congressional intent to enlist "private attorneys general" to assure compliance with the Act is evident from the face of the Act. A citizen's action may not be brought under Section 11(g) if the Secretary of Interior has already commenced a civil action or the United States has commenced (and is "diligently prosecuting") a criminal action with respect to the alleged violation. 16 U.S.C. § 1540(g)(2)(A). It is also evident from the legislative history of the Act:

> [Section 11(g)] authorizes citizen actions to enforce the provisions of the Act. It allows any person, including a Federal official, to seek remedies involving

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[21] Petitioner's claim that respondents do not have a cause of action under Section 11(g) because the Secretary of Interior is not violating the Act is incorrect. *See* Petitioner's Brief at 29. Section 7 requires that federal agencies consult with the Secretary of Interior regarding the effect of agency actions on endangered species. 16 U.S.C. § 1536(a)(2). The Secretary's refusal to engage in such consultations with respect to agency actions that may affect endangered species overseas constitutes a clear violation of the Act. Moreover, petitioner's claim is immaterial to the standing issue, since "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal . . . ." *Warth* v. *Seldin*, 422 U.S. at 500.

> injunctive relief for violations or potential violations of the Act.[22]

As has been shown, Congress found that all persons are injured by a loss of global biodiversity, and that ill-considered federal agency action causes such a loss. *See supra*, sections I.A., I.B. It was thus entirely reasonable for Congress to authorize "any person" to sue to enjoin such an injury and violation of the Act.

When Congress intends to create a statutory cause of action for a limited class of persons, the statute set forth these limitations.[23] Here, however, for good reason, Congress intended that *any* person might sue for *any* violation of the Act. The citizen suits provision is thus rationally related to Congress's factual determination that all persons are injured by a loss of global biodiversity.

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[22] House Comm. on Merchant Marine and Fisheries, Endangered and Threatened Species Conservation Act of 1973, H.R. Rep. No. 412, 93d Cong., 1st Sess. 19 (1973), *reprinted in* 1982 Legislative History, *supra* note 1, at 158. This report also notes that:

> [t]he language [of section 11(g)] is parallel to that contained in the recent Marine Protection, Research and Sanctuaries Act 1972 ["MPRSA"], and is to be interpreted in the same fashion.

Id. The legislative history of the MPRSA indicates that its citizen suits provision, 33 U.S.C. § 1415(g), also was intended primarily as an enforcement mechanism. *See* House Comm. on Merchant Marine and Fisheries, Marine Protection Research and Sanctuaries Act of 1971, H.R. Rep. No. 361, 92d Cong., 1st Sess. 23 (1971); Senate Comm. on Commerce, Marine Protection and Research Act of 1971, S. Rep. No. 451, 92d Cong., 1st Sess. 23, *reprinted in* 1972 U.S.C.C.A.N. 4234, 4249.

[23] For example, the Federal Aviation Act limits suits to "person[s] disclosing a substantial interest in [any order issued by the Secretary of Transportation under the Act]," 49 U.S.C. § 1486(a); the Presidential Election Campaign Fund Act authorizes suits only by "[t]he [Federal Election] Commission, the national committee of any political party, and individuals eligible to vote for President," 26 U.S.C. § 9011(b)(1).

Congressional factual findings deserve judicial deference:

> When Congress makes findings on essentially factual issues . . . those findings are of course entitled to a great deal of deference in as much as Congress is an institution better equipped to amass and evaluate the vast amounts of data . . . .

Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985). Legislative factual determinations, such as those manifest in Sections 7 and 11 of the Act, are to be honored by the courts unless the finding is "so clearly wrong that it is 'arbitrary,' 'irrational,' or 'unreasonable.'" *Oregon* v. *Mitchell*, 400 U.S. 112, 248 (1970).[24] As has been shown, Congress's factual findings pertinent to the three requisites of standing are clearly rational, reasonable, and non-arbitrary.

Statutorily created regulatory mechanisms—such as the citizen suit enforcement mechanism prescribed in Section 11—are also entitled to deference. The Court has stated, "[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary . . . our investigation is at an end." *Katzenbach* v. *McClung*, 379

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[24] *See also Board of Educ. of Westside Community Schools* v. *Mergens*, 110 S. Ct. 2356, 2372 (1990) (Court declined to "second guess" legislative judgment that high school students are unlikely to confuse a policy of equal access to public school facilities for student-run religious organizations with state sponsorship of religion, "particularly where the judgments are based in part on empirical determinations"); *Rostker* v. *Goldberg*, 453 U.S. 57, 81-83 (1981) (Court deferred to congressional determination based on extensive testimony that women should not be permitted in military combat positions); *Vance* v. *Bradley*, 440 U.S. 93, 111 (1979) (Court deferred to congressional determination that Foreign Service officers should retire at age 60); *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152-54 (1938) (Court deferred to congressional finding that "filled milk" is injurious to health).

U.S. 294, 303-04 (1964).[25] "[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to preempt congressional action by judicially decreeing what accords with 'common sense and the public weal.'" *TVA* v. *Hill*, 437 U.S. at 195.

The propriety of using "private attorneys general" to assist in the enforcement of statutes is, of course, well-established. *See, e.g., Agency Holding Corp.* v. *Malley-Duff & Assoc., Inc.*, 483 U.S. 143 (1987); *Trafficante* v. *Metropolitan Life Ins.*, 409 U.S. 205 (1972). The Court routinely recognizes the standing of citizen enforcers even in cases where the injury is defined by statute and would not exist but for the statute. *See, e.g., Havens Realty*, 455 U.S. at 373-374.

Indeed, in so-called "*qui tam*" actions—where the plaintiff (the "informer" or "relator") asserts a claim alleging a statutory violation of a governmental interest—no showing of personal injury stemming from the alleged violation is required. "Statutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government." *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 541 n.4 (1943) (quoting *Marvin* v. *Trout*, 199 U.S. 212, 225 (1905)).[26]

Qui tam actions accord with the separation of powers principle and Article III. *United States ex rel. Wein-*

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[25] *See also Mathews* v. *de Castro*, 429 U.S. 181, 185 (1976) ("Governmental decisions to . . . improve the general public welfare . . . are 'not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise in judgment.'" (quoting *Helvering* v. *Davis*, 301 U.S. 619, 640 (1937))).

[26] *See generally* Caminker, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341 (1989).

berger v. *Equifax, Inc.*, 557 F.2d 456 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *United States ex rel. Newsham* v. *Lockheed*, 722 F. Supp. 607 (N.D. Cal. 1989); *United States ex rel. Stillwell* v. *Hughes Helicopters, Inc.*, 714 F. Supp. 1084 (C.D. Cal. 1989). As noted in *Newsham*, "private enforcement initiatives conformed to the Framers' original understanding of the separation of powers secured by the Constitution, as well as the Framers' concept of cases and controversies appropriate for federal court decision." *Id.* at 615. If *qui tam* actions, by persons suffering no injury, comport with Article III and the separation of powers principle, then surely Section 11 enforcement actions—by persons determined by Congress to be injured as a result of unconsidered and unlawful federal agency action—do so.

Denial of standing in this case would limit "the power of the legislature to articulate public values and choose the manner in which they may be enforced." [27] Congress found the Section 7 consultative mechanism to be an effective means of ensuring that federal agencies do not destroy global biodiversity, and determined that Section 11 citizen suits would enforce compliance with Section 7. By denying standing, the Court would be rewriting these key provisions of the Act. The Court would be making legislative policy judgments contrary to the express determinations of Congress and contrary to the very separation of powers principle invoked by petitioner.

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[27] Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 233 (1988).

CONCLUSION

The decision of the Court of Appeals with respect to standing should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MANUEL LUJAN, JR.,
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Petitioner,

v.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF *AMICI CURIAE* CITY OF AUSTIN, TEXAS; TRAVIS COUNTY, TEXAS; AMERICAN SOCIETY FOR THE PROTECTION OF NATURE IN ISRAEL; ENVIRONMENTAL DEFENSE FUND, INC.; NATIONAL WILDLIFE FEDERATION; WORLD WILDLIFE FUND; SIERRA CLUB; AND FUNDACION NATURA IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The City of Austin, Texas; County of Travis, Texas; American Society for the Protection of Nature in Israel ("ASPNI"); Environmental Defense Fund, Inc. ("EDF"); National Wildlife Federation ("NWF"); World Wildlife Fund ("WWF"); Sierra Club; and Fundación Natura submit this brief in support of the Respondents Defenders of Wildlife, et al.[1]

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[1] The parties have consented to the filing of this brief. Their letters of consent are being filed with the Clerk of the Court.

The City of Austin is a home rule municipality and political subdivision of the State of Texas. Austin's metropolitan area provides habitat for federally listed endangered species. The City of Austin has been participating in efforts to formulate a regional habitat conservation plan for the past several years. Austin's interest in the protection of endangered species is not limited to the central Texas area, since some of the species it is trying to conserve migrate in the winter to Central America.

Travis County is a duly constituted county and political subdivision of the State of Texas. Travis County's geographical area provides habitat for federally listed endangered species. The County of Travis has been participating in efforts to formulate a regional habitat conservation plan for the past several years. Travis County's interest in the protection of endangered species is not limited to the central Texas area for the same reason the City of Austin's is not.

ASPNI is dedicated to increasing the American public's awareness and support of the critical environmental work being conducted in Israel by the Society for the Protection of Nature in Israel ("SPNI"). Since 1953, SPNI has been the leader of efforts to preserve Israel's natural heritage. Because Israel's geographic location is at the crossroads of Asia, Africa, and Europe, it has been endowed with an unusual variety of plant and animal species. ASPNI and SPNI are dedicated to the protection of Israel's wealth of animal and plant species such as the Great Griffin vultures, tiny sunbirds, gazelles, ibex, and wildflowers.

EDF is a national nonprofit membership organization dedicated to finding scientifically sound and economically viable solutions to environmental problems. Among the problems to which EDF has devoted substantial resources is the accelerating endangerment and loss of species in the United States and elsewhere. EDF's members use and enjoy the living wild resources of the United States and

elsewhere for scientific study, aesthetic appreciation, recreation, and for their historic, cultural, ecological, scientific, and educational value.

NWF is the nation's largest, not-for-profit conservation education organization dedicated to the wise management of the natural resources of the world, including wildlife. To that end, NWF's staff has worked since 1936 at the international, national, regional, and local level to encourage the protection and preservation of endangered and threatened species.

WWF is the largest private U.S. organization working worldwide to conserve nature. WWF works to preserve diversity and abundance of life on earth and the health of ecological systems by protecting natural areas and wildlife populations, promoting sustainable use of natural resources, and promoting more efficient resource and energy use and the maximum reduction of pollution.

The Sierra Club is a national nonprofit organization dedicated to enhancing and protecting the natural resources and human environment of the earth. The Sierra Club's concerns encompass the protection of global biodiversity and the protection of threatened and endangered species. The Club's vital interest in this case stems from its longstanding and continuing efforts to ensure proper interpretation and enforcement of the Endangered Species Act.

Fundación Natura is a private, nonprofit organization working to promote environmental conservation in Ecuador, including wildlife. Because the United States government authorizes or funds different projects in Ecuador, Fundación Natura views the Section 7 consultation process of the Endangered Species Act as a useful instrument to assist in its conservation effort.

STATEMENT OF FACTS

Amici curiae adopt by reference the Statement of Facts set forth in the Brief for the Respondent Defenders of Wildlife filed with this Court.

SUMMARY OF ARGUMENT

Section 7 of the Endangered Species Act, 16 U.S.C. § 1536(a)(1) & (2), by requiring federal agencies to insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species, provides one of the most effective available safeguards against the destruction and elimination of wildlife. The Endangered Species Act and its antecedents, with their frequent references to international wildlife and the need to protect *all* endangered species, illustrate the commitment on the part of the United States to protect and preserve the wildlife of the world.

This commitment has now been weakened by the Secretary of the Interior's 1986 rule which eliminates the Endangered Species Act's requirement that a U.S. agency approving or funding a project or action abroad must insure that such action is not likely to jeopardize endangered species. The revised rule stands in stark contrast to the plain language of the Endangered Species Act, its legislative history, and subsequent administrative actions and legislative amendments to the Act.

ARGUMENT

I. THE APPLICATION OF SECTION 7 OF THE ENDANGERED SPECIES ACT TO FEDERAL ACTIONS AT HOME AND ABROAD IS NECESSARY TO IMPLEMENT THE ACT'S PURPOSES AND TO PREVENT ADVERSE EFFECTS TO ENDANGERED SPECIES WITHIN AND WITHOUT THE UNITED STATES

Human activities are causing a dramatically accelerating loss of plant and animal species throughout the world. Habitat loss, as a result of rapidly increasing development, is the primary cause of a swelling tide of extinction. The purpose of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, quite simply, is to turn that tide.

"The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*." *TVA v. Hill*, 437 U.S. 153, 184 (1978) (emphasis added).

While the Act cannot prevent all species extinctions occurring today, it is within the Act's power to prevent those that might occur as the result of actions of the federal government. In 1973, through Section 7 of the Endangered Species Act, Congress prescribed a very simple, yet fundamental, rule: henceforth, the federal government would no longer knowingly be the agent of any species' destruction. Instead, "[e]ach Federal agency shall . . . insure that any action authorized, funded or carried out by [it] is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2).

In the case now before this Court, the government argues that Congress meant something less than what it clearly said (Petitioner's Brief ("Pet. Br."), pp. 31-35). The government urges that the duty imposed by Section 7, though unlimited on its face, should be given a limited geographic scope; specifically, it should be interpreted to apply only to the actions of federal agencies carried out within our own national borders or on the high seas (Pet. Br., pp. 43-45). Federal activities within foreign nations, the government argues, should be beyond the scope of Section 7 (Pet. Br., pp. 45-49). In another country, federal agencies should be free to do what they cannot do here—authorize, fund, or carry out activities that extinguish an entire, unique species of life. Such a result is plainly contrary to the purposes, language, and legislative history of the Act. As this Court explained in *Hill*, "the language, history, and structure of the legislation . . . indicate[] beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *TVA v. Hill*, 437 U.S. at 174.

The duty of federal agencies to insure that their actions not jeopardize the survival of any endangered species is aided by a series of procedures designed to inform an agency of the likely consequences of its planned actions. Under Section 7, an agency proposing to take an action must inquire of the Secretary of the Interior whether any threatened or endangered species "may be present in the area of the proposed action." 16 U.S.C. § 1536(c)(1). If the Secretary responds that one or more such species may be present, then the agency must prepare a "biological assessment" to determine whether any such species is "likely to be affected" by the action. *Id.* If the agency determines that such an effect is likely, it must formally consult with the Secretary, who must prepare a written biological opinion "detailing how the agency action affects the species or its critical habitat."[2] 16 U.S.C. § 1536(b)(3)(A).

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[2] Agencies must review their actions by preparing a biological assessment to determine if there are, in fact, listed species present in the "action area" that may be adversely affected. 50 C.F.R. § 402.12(k). "The biological assessment shall be completed before any contract for construction is entered into and before construction is begun." 50 C.F.R. § 402.12(b)(2). This requirement that agencies review their activities and prepare biological assessments before even entering into contracts for construction promotes informed decision making and provides substantial protection to listed species.

At the very moment it is determined that consultation is required, a second level of "benefit" is conferred on parties interested in preserving listed species because, under the Act, each federal agency is prohibited from irreversibly or irretrievably committing any resources to an action that forecloses the implementation of alternative measures which might allow the agency action to go forward without jeopardizing listed species. 16 U.S.C. § 1536(d). An agency that ignores the prohibition on resource commitment, or one that continues work on a project while preparing a biological assessment, is no longer eligible for an exemption from the consultation process. 16 U.S.C. § 1536(h)(1)(A)(iv).

Thus, federal agencies are obligated to do a preliminary review of their projects and a biological assessment to determine whether formal consultation is necessary, they are obligated to initiate

Whenever in his biological opinion the Secretary concludes that a proposed federal action is likely to jeopardize the continued existence of a listed species, he must suggest "those reasonable and prudent alternatives which he believes would not violate" the prohibition against jeopardy. *Id.* As a result of these careful processes, designed to provide federal agencies with the best available information about the effects of their planned actions on listed species, as well as alternatives to avoid unacceptable effects, Section 7 has historically been quite successful in preventing the loss of species without significant disruption of federal activities.[3]

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formal consultation where listed species may be affected, and they are obligated to immediately alter their actions to avoid an irretrievable commitment of resources at the beginning of the consultation process. These elements combine to confer an immediate benefit to threatened and endangered species even before formal consultation has been instigated.

[3] In San Jose, California, developers of a landfill which was subject to the consultation process agreed to a number of mitigation measures to offset the project's impact on the Bay checkerspot butterfly; those mitigation measures included a conservation trust fund, ongoing research, habitat acquisition and management, restoration and revegetation when the landfill reached its capacity, and off-site reintroduction and recovery for the butterfly. Authorization for the project was granted, but with mitigation measures which assured the butterfly's continued existence. In Florida, several marina projects on the intracoastal waterway posed potential impacts on the West Indian manatee. The biological opinion issued as a result of the consultation process prescribed a number of measures, which were adopted, to significantly lessen the impact on the animal. These measures were not intrusive, but by limiting the number of powerboat slips, reducing boat speed limits, and conditioning slip rental agreements, interference with the manatee's habitat was significantly limited. S. Yaffee, "Avoiding Endangered Species/Development Conflicts Through Interagency Consultation," in *Balancing on the Brink of Extinction* (K. Kohm, ed., 1991), at 89. *See Endangered Species Act Reauthorization: Hearing on H.R. 1476 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 100th Cong., 1st Sess. 275 (1987) (prepared statement of J. Scott Feierabend, Director, Fisheries and Wildlife Division, National Wildlife Federation).

In addition to suggesting a limitation that does not appear on the face of Section 7, the government fails to acknowledge that although the federal activities at issue here may occur within foreign nations, the effects of those activities can be, and often are, felt within the United States. One dramatic example concerns two of the *amici* here. The area of Travis County, Texas around Austin is the principal breeding range of an endangered migratory bird, the golden-cheeked warbler. The bird occurs there in the spring and summer months; in the autumn it migrates south to Guatemala and adjacent areas. Land use in Austin and elsewhere in Travis County must be carefully controlled to ensure that no "taking" of the bird occurs incidental to development there. To guarantee its compliance with this requirement, the City and County have been engaged in a lengthy and expensive effort to develop a "habitat conservation plan" upon which to base an application for an "incidental taking permit" under Section 10(a)(1)(B) of the Endangered Species Act. 16 U.S.C. § 1539(a)(1)(B).

Meanwhile, federally funded activities in Guatemala, such as a major pesticide spraying program underwritten by the U.S. Animal and Plant Health Inspection Service ("APHIS"), may adversely affect the warbler in its winter range. Under the government's interpretation of Section 7, APHIS need not consult with the Secretary of the Interior concerning the effects of this massive pesticide spraying program, and it has not done so. *See*, Addendum, Letter to Michael J. Bean from U.S. Department of Agriculture. As a result of this and other activities carried out by federal agencies in foreign countries, the substantial conservation investments being made in the United States by Travis County and Austin under the mandate of the Endangered Species Act could be rendered worthless.

The golden-cheeked warbler is not the only migratory species protected by the Endangered Species Act. There

are many others, including the whooping crane, roseate tern, Kirtland's warbler, peregrine falcon, piping plover, black-capped vireo, gray whale, humpback whale, Kemp's ridley sea turtle, and others. All of these species regularly spend part of their lives in the United States or its waters and another part in foreign countries or waters. While these species are in the United States, federal agencies and private citizens alike are under stringent duties to ensure their effective conservation. When the same animals migrate into the territory of another country, however, the government argues that federal agencies are free to do whatever they please, regardless of its impact upon these species and upon efforts in the United States to conserve them. Indeed, in the government's remarkable view, federal agencies do not even have a duty to ascertain the likely impacts of their actions on these species.

Beyond migratory species, there is yet another group of threatened or endangered species for which federal activities in foreign countries can have important effects within the United States. These are non-migratory species that occur in both the United States and foreign countries. Examples include the West Indian manatee, American crocodile, desert pupfish, least Bell's vireo, Sonoran pronghorn antelope, Everglades kite, and many others. To the extent that federal agency activities outside our borders reduce the numbers or range of a species that also occurs within the United States, the task of avoiding the extinction of that same species will fall even more heavily upon U.S. landowners, local governments, and others here. In some cases, species that once occurred in the wild in the United States no longer do, but they survive in foreign countries. Examples include the Mexican wolf and the ivory-billed woodpecker. Recovery of such species and restoration to their former habitats in the United States thus may depend entirely upon assuring their survival in those foreign countries. If federal government agencies are free to disregard Section 7, their

actions abroad can render impossible any prospect for the recovery of such species in the United States.

From all of the above examples, it is plain that the effects of the regulations at issue here are not limited to foreign countries. They can and will be felt here as well. Moreover, even with respect to species that never occur in the United States, their loss can have important effects here. Foreign species are the original source of many important medicines, such as vincristine and vinblastine, derived from the rosy periwinkle of Madagascar and used in the treatment of Hodgkins' disease. The President's recent heart ailment was treated with digoxin, a drug derived from Grecian foxglove, a native of central and southern Europe. Other similar examples are legion. *See* N. Meyers, *A Wealth of Wild Species: Storehouse for Human Welfare* (1983). American agriculture is similarly dependent upon preserving wild species elsewhere. Wheat, rice, potatoes, and other important American crops are not native to this country; to improve their resistance to pests, disease, drought, and other stresses, they require regular improvements through crossbreeding with genetically related wild plants typically found in regions of the world in which these crops originated. *Id.* at 27-42. Thus, the loss of species in distant lands can impair agricultural productivity and the prospects for medical advances here at home.

For all of these reasons, it is clear that although the federal activities at issue in this case take place in foreign countries, their effects are likely to be felt here. The purpose of the Endangered Species Act, to stem the tide of extinctions so that we can continue to enjoy the enormous benefits of biological diversity, would be seriously undermined by the interpretation of Section 7 that the government advances here. That interpretation should not be embraced; the plain language of the Act, its legislative history, and the very purpose and structure of the Act all require that the government's interpretation be rejected.

II. THE SECRETARY'S EXEMPTION OF FOREIGN ACTIONS FROM THE ENDANGERED SPECIES ACT'S CONSULTATION REQUIREMENT IS INCONSISTENT WITH CONGRESS' INTENT TO CREATE AN EFFECTIVE PROCEDURE FOR PROTECTING *ANY* ENDANGERED AND THREATENED SPECIES

The plain statutory language of "*any* action" and "*any* endangered species or threatened species" demonstrates Congress' intent to create a statute with international application. As demonstrated below, the Secretary's revised 1986 rule which eliminates the consultation requirement for federal actions occurring on foreign soil is inconsistent with the plain language and legislative history of the Act.

A. The Plain Language, Structure, and Purpose of the Endangered Species Act Mandate That the Consultation Process Occur Even When the Action Takes Place on Foreign Soil

The starting point for any statutory analysis must be the language of the statute itself. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982). When the language of a statute is clear, it is that language which conclusively determines its applicability. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 845 (1984). This Court has recognized the clarity of the Endangered Species Act's language: "One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. . . . This language admits of no exception." *TVA v. Hill*, 437 U.S. at 173.

Congressional intent to have the consultation process applicable to foreign actions is reflected in the plain language of Sections 4 and 7 of the Endangered Species Act. As stated above, consultation is mandated whenever *any* agency action may jeopardize *any* endangered species; since such species exist in large measure abroad, as Con-

gress well knew, a plain reading of the statute requires that the consultation process apply to agency actions which occur overseas.

In addition, the interplay between Sections 4 and 7 manifests Congress' intent that actions overseas be subject to the consultation requirement of Section 7(a)(2). This relationship is apparent upon examination of Sections 4 and 7. Section 4 requires the Secretary to list species as threatened or endangered, including those that occur in whole or in part outside the United States. Under Section 4(b):

> (1)(A) The Secretary shall make determinations . . . solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or *foreign nation*, . . . to protect such species . . . .
>
> (B) In carrying out this section, the Secretary shall give consideration to species which have been—
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> (i) designated as requiring protection from unrestricted commerce by any *foreign nation*, or pursuant to any *international agreement*; or
>
> (ii) identified as in danger of extinction . . . by any State agency or by any agency of a *foreign nation* that is responsible for . . . conservation . . . .

16 U.S.C. § 1533(b) (emphasis added). Section 4 also requires that the Secretary provide notice to countries in which listed species occur.[4] Almost half of all species so

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[4] "[T]he Secretary shall . . . insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each *foreign nation* in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon." 16 U.S.C. § 1533(b)(5)(B) (emphasis added).

designated have been foreign to the United States.[5] 50 C.F.R. § 17.11.

The government insists that there must be a "clear statement" of Congressional intent before a statute is given extraterritorial application, and it disparages the decision of the Court of Appeals because that court found evidence of that intent in *other* (*i.e.*, non-Section 7) provisions of the Act. The Department of the Interior, however, itself interprets Section 7 as having extraterritorial effect on the high seas, and it premises that interpretation on *other* provisions of the Act (*i.e.*, Section 9). Section 9's restrictions on taking, which the Department of the Interior says justify the extension of Section 7 to the high seas, have their parallel in Section 9's restrictions on foreign commerce, which offer at least as much justification for extending Section 7 to foreign countries.

The Secretary's interpretation of the Act leads to the absurd result that species dwelling both in the United States and other nations and listed by the Secretary as endangered are not afforded full protection. While the governments of the nations in which a particular species occurs are notified of a proposal to list it as endangered or threatened, thereafter agencies of the United States can proceed with actions abroad that jeopardize its existence without so much as consulting with the wildlife experts at the Department of the Interior. On the other hand, the very same species also dwelling in the United States must be protected. The golden-cheeked warblers that migrate between Guatemala and Texas illustrate the absurdity of an uneven application of Section 7. While

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[5] As of May 31, 1991, 522 listed species (of a total of 1137) occur exclusively in foreign countries. A large percentage of the remaining species are migratory or have ranges that extend beyond the United States. U.S. Fish and Wildlife Service, Endangered Species Technical Bulletin, Vol. XVI, No. 6, June 1991, p. 12. Thus, the government's interpretation reads nearly half of all listed species out of Section 7's consultation process, despite the plain language of Section 7 referring to *any* listed species.

in Texas, the birds receive legal protection from the federal government, including protection provided by the threat of criminal prosecution against violators of the Act. Upon leaving the U.S., however, the birds are imperiled by that same government which supports actions destroying their habitat and food sources.

Other provisions and sections of the Act confirm Congress' concern with the international nature of the endangered species problem. Section 1(a) of the Act, the "Congressional findings and declaration of purposes and policy," includes the statement:

> the United States has pledged itself as a sovereign state in the *international community* to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction . . . .

16 U.S.C. § 1531(a)(4) (emphasis added).[6] In this, in other declared findings and policies, and throughout the Act, Congress makes no distinction between foreign and domestic listed species.

Nothing in the exemption provision of Section 7(e)-(p), 16 U.S.C. § 1536(e)-(p), implies a domestic limitation to the consultation provision of Section 7(a)(2). In fact, segments of the exemption procedure clearly contemplate actions abroad. Section 7(g)(1) provides that "the Governor of the State in which an agency action will occur, *if any*, . . . may apply to the Secretary for an exemption . . . ." 16 U.S.C. § 1536(g)(1). Agency actions that will not occur in any state are agency actions abroad, unless plain meaning is to be stretched to the breaking point. Subsection (i), providing for review of agency actions by the Secretary of State in order to grant exemptions where compliance with the Act's provisions

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[6] This pledge was made pursuant to numerous international agreements including: migratory bird treaties with Canada, Mexico, and Japan; the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (Western Convention); and the Convention on International Trade in Endangered Species. 16 U.S.C. § 1531(a)(4).

"would be in violation of any international treaty obligation or other international obligation of the United States," further illustrates that consultation obligations extend to foreign actions. 16 U.S.C. § 1536(i). Subsection (j) allows the Secretary of Defense to secure an exemption from Section 7 for any agency action if "necessary for reasons of national security." 16 U.S.C. § 1536(j). Many such obvious national security actions could take place outside U.S. borders.[7]

Section 7(n)(2), which provides for judicial review of an exemption decision by the Endangered Species Committee, requires suit to be filed in the U.S. Court of Appeals for the District of Columbia Circuit "in any case in which the agency action will be or is being, carried out *outside of any circuit* . . . ." 16 U.S.C. § 1536(n)(2) (emphasis added). Thus, Congress clearly contemplated that actions subject to Section 7 consultation might occur outside the United States and its territories, all of which are part of one or another of the judicial circuits. Moreover, had Congress intended by this language to cover only actions on the high seas, it would have expressly used the phrase "high seas" as it did elsewhere in the Act, *see, e.g.*, 16 U.S.C. § 1538(a)(1)(C), rather than referring to actions "outside of any circuit."

The Secretary's interpretation of the Act attempts narrowly to circumscribe the international reach of the Act by citing Section 8, entitled "International Cooperation," as evidence that the Act's specific provisions are either domestic *or* international, but not both (Pet. Br., pp. 39-40). This categorization is not persuasive. Section 8(b) requires that the Secretary of State encourage "foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and

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[7] The floor debate concerning this provision reveals that Congress was in fact concerned about waging war, including the launching of intercontinental ballistic missiles. *See* 124 Cong. Rec. 21,592-93 (1978).

threatened species listed pursuant to section 1533." 16 U.S.C. § 1537(b)(1). Surely this provision, mandating a leadership role for the United States in species preservation worldwide, does not contradict but rather reinforces an intent to have the federal government's own agencies promote the Act's requirements abroad.

The structure of the statute also demonstrates that the various sections of the Act were designed to overlap and to be interpreted *in pari materia* with them, *i.e.*:

Section 6, 16 U.S.C. § 1535, Cooperation With States

Section 7, 16 U.S.C. § 1536, Interagency Cooperation

Section 8, 16 U.S.C. § 1537, International Cooperation

With such statutory structure, it is inconceivable that the Secretary would argue that, because there is a separate section of the Act dealing with federal "Cooperation With States," the Section 7 consultation requirement should not apply to federal agency action occurring in a state. Yet the Secretary makes that very argument with respect to agency relationship on wildlife issues in foreign nations (Pet. Br., p. 37). This argument ignores Congressional intent, which is plainly illustrated by the structure of the Act, that Section 8 should not preclude application of Section 7 to foreign actions. Hence, the statutory text and the very structure of the Act express a clear intent that Section 7 apply to activities in foreign nations.

B. The Legislative History Confirms That Congress Intended the Endangered Species Act to Apply to Federally Funded or Authorized Action Abroad

The antecedents from which the Endangered Species Act arose are replete with international objectives. It is not surprising, therefore, that the present Act has a pervasive international cast. In fact, the earliest legislation in the United States designed specifically to protect and preserve endangered or threatened species was prompted

by the First World Conference on National Parks held in 1962. After the World Conference, the Secretary of the Interior, Stewart Udall, proposed the Endangered Species Preservation Act, Pub. L. No. 89-669, 80 Stat. 926 (1966), which he described as a "fresh and assertive effort to authorize Federal participation in the national and *international* programs to preserve our . . . wildlife heritage." 1966 *U.S. Code Cong. & Ad. News* 3342, 3344 (emphasis added).[8]

In 1969, Congress passed the Endangered Species Conservation Act, Pub. L. No. 91-135, 83 Stat. 275 (1969), which authorized the Secretary of the Interior to protect animals threatened with worldwide extinction[9] by banning their import into the United States and barring the sale of domestically endangered species taken in violation of law. The Senate report described the purpose of the Act's international tone as "insur[ance] that the United States does not contribute to the extirpation of other nations' wildlife." S. Rep. No. 307, 93d Cong., 1st Sess. 1, 2 (1973), *reprinted in* 1973 *U.S. Code Cong. & Ad. News* 2989.

Shortly after the enactment of the Endangered Species Conservation Act, the Secretary promulgated a list of endangered fish and wildlife, compiled from data supplied by international conservation organizations. The list, which designated the location of the endangered species' natural habitat, included animals from all over the

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[8] The legislative history of the Act indicates that "[c]ertain features of the bill involve conservation treaties between the United States and other countries . . . [and] pursue[] our obligations under the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, 1940." 1966 *U.S. Code Cong. & Ad. News* 3342, 3356.

[9] In signing the Endangered Species Conservation Act into law, President Richard Nixon commented: "I am signing into law the most significant action this Nation has ever taken in an international effort to preserve the world's wildlife." *Public Papers of the Presidents*, Richard Nixon, 1969 "Statement on Signing the Wildlife Bill," p. 995.

world.[10] It is evident from a review of the very first endangered species list that the United States has historically been committed to protecting endangered species dwelling beyond its borders, not just protecting those within its borders. Thus, the Endangered Species Act reflects the fact that the United States has assumed responsibility as a leader in the international community for endangered species conservation.[11]

While the 1966 and 1969 endangered species legislation did not contain consultation provisions approaching the breadth of Section 7(a)(2) of the current Act, the legislative history provides no directive that the consultation duty present in the earlier versions of the statute was to be limited exclusively to domestic actions. Both statutes do, however, provide a clear directive that the Acts were to be worldwide in their scope.

The legislative history of 1973's Endangered Species Act and its subsequent amendments further demonstrate that Congress intended to continue the international scope of previous wildlife legislation by requiring the consultation procedure of Section 7(a)(2) to apply to *all* agency actions, domestic and foreign.

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[10] For example, the list of endangered species catalogued animals which are found exclusively in countries abroad, but also indicated that certain animals either migrate between, or occur within, the U.S. and one or more foreign countries. Examples include the masked bobwhite quail, the American peregrine falcon, the brown pelican, the thick-billed parrot, the ivory-billed woodpecker, and many others. When an animal migrates during the year between different countries or its natural habitat crosses international boundaries, it is absurd to view efforts to preserve it as solely a domestic matter.

[11] The legislative history of the Endangered Species Preservation Act indicated the role which the United States plays in setting the pace for the international effort to preserve and protect wildlife: "Many of the emerging nations . . . look to us for guidance and example in natural resource husbandry." 1966 *U.S. Code Cong. & Ad. News* 3342, 3343.

During House debate on the 1973 Endangered Species Act, Representative Dingell explained the significance of Section 7:

> Another important step we have taken in this bill . . . is that we have substantially amplified the obligations of both agencies [Interior and Commerce], and other agencies of Government as well, to take steps within their power to carry out the purposes of this Act.

119 Cong. Rec. 42,913 (1973) (statement of Rep. Dingell). Representative Dingell illustrated this statement with two examples. The first dealt with a threat to the whooping crane caused by the Air Force bombing activities near its wintering grounds on the Texas coast. As indicated earlier, the endangered species list includes the whooping crane and denotes its natural habitat as the United States *and* Canada.

Representative Dingell continued by noting "[a]nother example has recently crossed my desk, having to do with the *continental* population of grizzly bears which may or may not be endangered but which is surely threatened." *Id.* (emphasis added). Representative Dingell illustrated the problem with reference to a *Field & Stream* article which discussed the "*North American* grizzly bear." [12] *Id.* It is not simply a coincidence that Representative Dingell illustrated his comments with animals whose domain is not exclusively in the United States; such examples demonstrate that Congress intended the duties associated with Section 7 to apply in an international context. [13]

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[12] The placement and content of this discussion in the legislative history make it evident that Representative Dingell was addressing the implications of the Section 7 consultation process.

[13] The government attempts to dismiss this portion of the legislative history by pointing to the fact that the report illustrated its point with a reference to the grizzly bears in Yellowstone Park (Pet. Br., p. 43). This example is purely anecdotal and in no way limits the scope of Section 7.

In discussing the parameters of Section 7, the House report stated "[t]his subsection requires . . . agencies to use their authorities in order to carry out programs for the protection of endangered species, . . . take the necessary action that will not jeopardize the continuing existence of endangered species or result in the destruction of critical habitat. . . ." H.R. Rep. No. 412, 93d Cong., 1st Sess. 1, 14 (1973). At the time the above statement was made, the endangered species list included numerous animals which were found only in foreign countries, yet the report does not distinguish between endangered species found in the United States and endangered species found abroad; the report simply states that "agencies take the necessary action that will not jeopardize the continuing existence of endangered species or result in the destruction of critical habitat of those species." [14] *Id.* Since endangered species included species from all over the world at the time the statement was prepared, it is evident that Congress intended the Section 7 process to

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[14] The Secretary argues (Pet. Br., p. 2) that he has consistently taken the position that his responsibilities under Section 7(a)(2) to designate the critical habitat of listed species do not apply to habitat in foreign countries and that this practice logically extends to his consultation duties. *Amici* note that the designation of critical habitat is not an issue here. Moreover, though the government contends that it would be illogical to give different geographic scope to the critical habitat and "jeopardy" requirements of Section 7, it should be noted that the government elsewhere has recently acknowledged that critical habitat designation provides little, if any, protection beyond that already provided by the "jeopardy" duty. *See* 56 Fed. Reg. 19,812 (1991) ("[i]n practice, the threshold required to make a finding of 'jeopardy' or 'destruction or adverse modification of critical habitat' are identical"). *See also*, M. Bean, *The Evolution of National Wildlife Law* (2d ed. 1983) at 359 ("any action that adversely modifies the critical habitat of any listed species must also jeopardize its continued existence"). Thus, even if the government is correct that the critical habitat provisions of Section 7 do not apply abroad, a point we do not concede, that fact does not result in diminished Section 7 protection for species outside our borders.

include actions which jeopardized endangered species abroad as well as in the United States.

During the floor debates prior to the approval of the House version, Representative Grover stated:

> [The bill] will permit administrative, economic, and legal actions designed to increase the population levels of these affected species *wherever they may live* and restore them to a meaningful role in their and our environment.

119 Cong. Rec. 30,165 (statement of Rep. Grover). Representative Grover's phrase "wherever they may live" illustrates Congressional intent that the Act apply to federally funded or approved activities the effects of which will be on foreign soil.

In *TVA v. Hill*, the Supreme Court addressed the original intent of the Endangered Species Act:

> The dominant theme pervading all Congressional discussion on the proposed [Endangered Species Act of 1973] was the overriding need *to devote whatever effort and resources were necessary* to avoid further diminution of national and *worldwide wildlife resources* . . . . The legislative proceedings in 1973 are, in fact, replete with expressions of concern over the risk that might lie in the loss of *any* endangered species.

TVA v. Hill, 437 U.S. at 177 (emphasis in original). This Court recognized Congress' awareness of the global nature of the endangered species problem and its resolve that the actions of U.S. government agencies should not further contribute to it:

> The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally *every section* of the statute . . . . In addition, the legislative history undergirding § 7 reveals *an explicit congressional decision to require agencies to*

> *afford first priority to the declared national policy of saving endangered species.* The pointed omission of the type of qualifying language previously included in endangered species legislation *reveals a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies.*

Id. at 184-85 (emphasis added).

The Secretary's limiting interpretation of Section 7 directly challenges the "conscious decision" of Congress, as interpreted by the Supreme Court. If species protection is to *take precedence over* the "primary missions" of federal agencies, such precedence must extend whether an agency's "mission" is carried out within the United States or abroad. Indeed, this Court has stated that, pursuant to Congressional intent evinced in the Act, whatever effort and resources were required to "avoid further diminution of national and *worldwide wildlife resources*" should be expended. *TVA v. Hill*, 437 at 177. The Secretary, in contrast, is essentially arguing that for those agencies that have "primary missions" abroad, the Section 7 consultation process does not apply. The argument has no more merit today than it did in 1978, when this Court rejected much the same argument in *Hill*.

C. Subsequent Administrative and Legislative Actions Are Consistent With the Application of Section 7 to Federal Actions Abroad

Following the Act's adoption in 1973, the Secretary began an interagency consultation and rulemaking procedure in order to implement its mandates. Proposed rules were published in 1977, applying Section 7's consultation requirements to agency actions likely to affect endangered species both within the United States and abroad. 42 Fed. Reg. 4868 (1977).[15] This position was

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[15] These proposed rules explicitly stated that Section 7 applied to U.S. agency actions taking place in other nations:

supported by the Council on Environmental Quality, the General Counsel's Office of the National Oceanic and Atmospheric Administration [16] and the Interior Department Solicitor's Office.[17] Other agencies, including the State and Defense Departments as well as the Army Corps of Engineers, opposed the application of Section 7 (a)(2) abroad. Upon considering the agency positions on both sides of the issue, the Secretary published final rules on January 4, 1978 codifying the extraterritorial application of Section 7. 43 Fed. Reg. 870, 873-74 (1978).

While the Secretary argues (Pet. Br., pp. 45-49) that, absent evidence of contrary Congressional intent, there is a presumption against extraterritorial application of statutes, the legislative history previously discussed and the subsequent legislative action outlined below provide a clear indication that Congress favors protecting *all* endangered species wherever they may reside. The presumption against extraterritoriality cannot overcome the plainly written requirements of the Endangered Species Act that *all* endangered and threatened species receive protection under Section 7.

> [Section 7] requires every Federal Agency to insure that its activities and programs in the United States, upon the high seas, and *in foreign countries* will not jeopardize the continued existence of a listed species.

42 Fed. Reg. at 4871 (emphasis added).

[16] The views of the National Oceanic and Atmospheric Administration are particularly important, since it is through that agency that the Secretary of Commerce carries out his duties under the Endangered Species Act, duties that are parallel with those of the Secretary of Interior. See the Act's definition of "Secretary" at 16 U.S.C. § 1532(14).

[17] The Interior Department Solicitor's Office commented: "[W]e believe the U.S. Fish and Wildlife Service's position is correct and conclude that the jeopardy clause applies to federal activities in foreign countries." Memorandum from Associate Solicitor, Conservation and Wildlife to Director, Fish and Wildlife Service (April 12, 1977).

In subsequent amendments to the Endangered Species Act, in 1978, 1979, and 1982, Congress reviewed the regulations requiring that Section 7 apply to actions abroad, and approved them. The 1978 amendment reorganized the Act, creating a new Section 7(a) which restated the original Section 7 consultation requirements and their 1978 interpretation. The Conference Report to these amendments explicitly approved the existing (extraterritorial) policy regarding agency consultation:

> The conferees adopted Senate language creating a new section 7(a), which essentially restates section 7 of existing law, and outlines the responsibilities of the Secretary and other Federal agencies for protecting endangered species . . . . The Conferees felt that the Senate provision *by retaining existing law, was preferable since regulations governing section 7 are now familiar to most Federal agencies* and have received substantial judicial interpretation.

H.R. Rep. No. 1804, 95th Cong., 2d Sess. 17, 18 (1978), *reprinted in* 1978 *U.S. Code Cong. & Ad. News* 9484, 9485 (emphasis added). This language constitutes the conference committee's "stamp of approval" of the worldwide scope of Section 7, and that, coupled with the international concerns expressed throughout the Act, makes it clear that Congress intended that Section 7 apply to all actions, including those by U.S. agencies operating in foreign countries. This comports with the longstanding view of this Court that when Congress reenacts a statute, administrative regulations interpretating that statute's provisions are considered adopted by Congress and have the force of law. *United States v. Zazove*, 334 U.S. 602, 623 (1948); *Helvering v. Winmill*, 305 U.S. 79, 83 (1938).[18]

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[18] Amending the Act in 1982, Congress again retained the existing language and extraterritorial interpretation of Section 7. The legislative history maintains that Section 7 did not result in "inordinate burdens upon Federal agencies . . . . In fact, the consultation provisions have functioned extremely well . . . ." H.R. Rep. No. 567, 98th Cong., 1st Sess. 1, 10, *reprinted in* 1982 *U.S. Code Cong. & Ad. News* 2807, 2813.

In 1983, the Secretary proposed revisions to the 1978 rule to eliminate agency actions in foreign nations from Section 7(a)(2)'s consultation requirements. 48 Fed. Reg. 29,990 (1983). Instead of the reasoned explanation required for such an abrupt policy shift,[19] the Secretary merely stated that recision was justified by the Act's apparent domestic orientation and its potential to interfere with the sovereignty of foreign nations.[20] *Id.*

Congress expressed outrage at the evident attempt on the part of the Secretary to ignore the intent and purpose of the Act and categorically rejected such an alteration. Congressional reaction to the Secretary's 1983 proposed rule change demonstrates that Congress viewed the Secretary's new interpretation as a betrayal of the legislative intent behind Section 7(a)(2). The House Appropriations Committee, considering the 1987 funding requests of the Interior Department stated: "[T]he Committee also expects the [U.S. Fish and Wildlife] Service to continue to provide consultation on endangered species to United States agencies dispensing foreign assistance." H.R. Rep. No. 714, 99th Cong., 2d Sess. at 19 (1986).

An even stronger reaction was voiced by the Senate Environment and Public Works Committee in its report on the 1987 amendments to the Act:

> An additional area of concern with current implementation of the Act relates to the regulations promulgated by the Secretary on June 3, 198€, which appear intended to limit the recovery and protection of the species under section 7 of the Act. To the extent that these regulations attempt to restrict the

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[19] "[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicles Manufacturers Association v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 41 (1983).

[20] The revised rule was published as final on June 3, 1986. 51 Fed. Reg. 19,926 (1986).

> Act's requirements that each federal agency consult with the Secretary to ensure that its actions are not likely to jeopardize the continued existence and recovery of any listed species, *the regulations have no statutory basis, are contrary to congressional intent, and are contrary to the law.*

S. Rep. No. 240, 100th Cong., 2d Sess. 1, 6-7 (1988), *reprinted in* 1988 *U.S. Code Cong. & Ad. News* 2700, 2705 (emphasis added). Furthermore, Senator John Chaffee, the floor manager of the 1978 amendments, summarized Congress' reaction to the Secretary's rule in a speech on the Senate floor:

> Congress is not in any way ratifying or approving that recision of the regulations. With or without those specific regulations, the law is clear. *It [Section 7(a)(2)] applies to federal agencies that are operating within or outside of the United States. Any other interpretation is intolerable and I believe illegal.*

134 Cong. Rec. S9758 (daily ed. July 25, 1988) (emphasis added).

The judiciary, as the final authority on issues of statutory construction, must reject administrative interpretations which are contrary to clear Congressional intent. *Chevron*, 467 U.S. at 843 n.9. Congress, in the plain language of the Act and in the legislative history surrounding it, has consistently made its intent clear that Section 7(a)(2)'s consultation requirements apply to agency actions abroad.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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ADDENDUM

[SEAL]

UNITED STATES DEPARTMENT OF AGRICULTURE
Office of the General Counsel
Washington, D.C. 20250-1400

August 8, 1991

Mr. Michael J. Bean
Senior Attorney
Environmental Defense Fund
1616 P Street, N.W.
Washington, D.C. 20036

Dear Mr. Bean:

This is in further response to your letter of May 21, 1991, concerning our Animal and Plant Health Inspection Service's (APHIS) Guatemala MOSCAMED Program. We regret the delay in responding.

We recognize your concern about the effect of the MOSCAMED Program on the golden-cheeked wood warbler in Guatemala. However, we are of the view that section 7 of the Endangered Species Act does not require the Department of Agriculture (USDA) to consult with the Department of the Interior (DOI) regarding its activities in Guatemala. The DOI has promulgated a regulation that states that a Federal agency's duty to consult is limited to activities conducted in the United States or on the high seas. Although this regulation has been successfully challenged in Federal court and is currently under review by the United States Supreme Court, the lower courts' decisions have been stayed pending the decision by the Supreme Court. Thus, the DOI regulation remains in effect and the USDA is in full compliance with the law.

APHIS published a draft Environmental Analysis (EA) in 1989. It then carefully considered all comments

received during a 60-day comment period and published a final EA in May 1991. An assessment of the effect of the MOSCAMED Program on the golden-cheeked wood warbler appears in appendix 8 of the final version of the document. APHIS concluded in the EA that the Program will have no effect on the warbler in Guatemala. The final EA and a packet of information containing APHIS' Record of Decision and news releases announcing the completion of the document were mailed to you on July 1.

APHIS is committed to complying with the applicable environmental laws. Thus, APHIS will consider any evidence the Environmental Defense Fund (EDF) is able to produce, independent of the information contained in the APHIS and Agency for International Development studies, that shows that the golden-cheeked wood warbler inhabits the specific areas of Guatemala to be sprayed under the MOSCAMED Program or that supports any of the claims the EDF has made concerning harm to the golden-cheeked wood warbler, concerning harm to other migrating insectivorous birds, or concerning any other adverse impacts that the EDF believes may result from the spraying program.

Sincerely,

/s/ Alan Charles Raul
ALAN CHARLES RAUL
General Counsel

90-1424

No. [redacted]

Supreme Court, U.S.
FILED
AUG 29 1991
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IN THE

United States Supreme Court

October Term, 1991

MANUEL LUJAN, Jr., Secretary of the Interior,
Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* ECOTROPICA FOUNDATION OF BRAZIL, SLOVAK UNION OF NATURE AND LANDSCAPE PROTECTORS, FUNDACION DE PARQUES NACIONALES OF COSTA RICA, AND GREENPEACE INTERNATIONAL IN SUPPORT OF RESPONDENTS

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United States Supreme Court

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No. 90-925

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BRIEF OF *AMICI CURIAE* ECOTROPICA FOUNDATION OF BRAZIL, SLOVAK UNION OF NATURE AND LANDSCAPE PROTECTORS, FUNDACION DE PARQUES NACIONALES OF COSTA RICA, AND GREENPEACE INTERNATIONAL IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.3, the above listed organizations file this brief as *Amici Curiae* in support of Respondents. Letters of consent from counsel for the parties have been filed with the Clerk.

Amici are foreign and international organizations concerned with the protection of the global environment, including the preservation of the Earth's species and more broadly the preservation of the Earth's biodiversity. These organizations are striving for new and better ways to accomplish this goal through international cooperation and an understanding that environmental problems know no territorial or jurisdictional boundaries.

This case concerns whether or not the American government in its actions abroad must pay heed to protecting the species inhabiting the nations in which the *Amici* are based, and in which th[illegible]ctively involved in efforts to preserve endangered and t[illegible]d species. The decision will have a direct effect on the ability of the *Amici* to meet their goals of species preservation in their nations and around the globe. A more detailed description of each *Amicus* appears in the Appendix.

SUMMARY OF ARGUMENT

THE *FOLEY* PRESUMPTION IS INAPPLICABLE TO ENVIRONMENTAL LAWS

The presumption enunciated by the Court in *Foley Bros. v. Filardo*, 336 U.S. 281 (1949), against the extraterritorial application of American laws is a canon of construction that is inapplicable in the context of environmental law. This presumption is based on the assumptions that Congress is primarily concerned with domestic conditions and that the extraterritorial application of American laws should be limited to prevent conflicts between our laws and those of other nations. *Foley Bros. v. Filardo*, 336 U.S. 281 (1949); *EEOC v. Arabian American Oil Co.*, 111 S.Ct. 1227 (1991). Neither of these assumptions apply to the sphere of environmental law and therefore the *Foley* presumption should not be applied.

CONTEMPORARY ASSUMPTIONS ABOUT CONGRESS' EXPERIENCE AND INTENT SHOW THE NEED TO REVERSE THE *FOLEY* PRESUMPTION SO THAT ENVIRONMENTAL STATUTES ARE PRESUMED TO APPLY EXTRATERRITORIALLY.

In this age of growing interdependence, Congress is increasingly being called upon to adopt legislative measures aimed at addressing global environmental threats. In order to avoid frustrating Congress' legitimate efforts to resolve these threats, a new presumption is required that American environmental laws are extraterritorial in scope unless there is a clear statement by Congress to the contrary.

CONSISTENT WITH THIS COURT'S PRIOR DECISIONS, ENVIRONMENTAL LAWS SHOULD APPLY EXTRATERRITORIALLY BECAUSE OF THEIR HARMFUL DOMESTIC EFFECTS.

If this Court is unwilling to adopt a presumption of extraterritoriality, then the Court should recognize that, consistent with the Court's prior decisions, environmental laws should be applied extraterritorially in light of the harmful domestic effects of environmental threats.

ARGUMENT

I. THE *FOLEY* PRESUMPTION IS INAPPLICABLE TO ENVIRONMENTAL LAWS.

A. The Assumptions Underlying *Foley*.

The *Foley* presumption is a canon of construction which provides that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. . . ." *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).[1] The *Foley* Court based this presumption on the "assumption that Congress is primarily concerned with domestic conditions." *Id.* at 285. In *EEOC v. Arabian American Oil Co.*, 111 S.Ct. 1227 (1991), this Court stated a second assumption, that the extraterritorial application of American laws should be limited to prevent "clashes between our laws and those of other nations which could result in international discord." *Id.* at 1230.[2]

B. The Assumptions Underlying *Foley* Do Not Apply to Environmental Laws and Therefore The *Foley* Presumption Itself Is Inapplicable.

Canons of construction such as the *Foley* presumption "are not rules of law but merely axioms of experience." *See Weinberger v. Rossi*, 456 U.S. 25, 28 (1982) (quoting *United*

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[1]The origins of the *Foley* presumption can be found in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). *See* J. Turley, *"When In Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 Nw. U.L. Rev. 598, 634 (1990).

[2]The rationale for this second assumption also appears to be an outgrowth of the Court's 1909 decision in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). *Compare Arabian American Oil Co.*, 111 S.Ct. at 1230, *with American Banana*, 213 U.S. at 355-6.

States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952)). These axioms of experience are valid only as long as they accurately reflect Congress' experience and intent.[3] Before applying a canon of construction courts must determine, in light of each specific situation, whether or not the canon is valid in that context.[4]

Because the assumptions underlying *Foley* no longer reflect Congress' experience or intent regarding environmental issues in general and the Endangered Species Act of 1973, Pub. L. No. 93-205, Dec. 28, 1973 (codified as amended at 16 U.S.C. §§ 1331-44) (the "Endangered Species Act"), in particular, the *Foley* presumption impedes Congress' efforts to address the global environmental threats now faced by the United States.

1. Congress' Environmental Concerns Go Beyond Domestic Conditions.

The "assumption that Congress is primarily concerned with domestic conditions," *Foley*, 336 U.S. at 285, does not reflect congressional experience or intent in the field of environmental legislation. No other area of international law has received more congressional consideration than the international environmental area, where Congress has repeatedly and explicitly recognized the necessity for global responses to environmental

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[3]*See United States v. Albertini*, 472 U.S. 675, 680 (1985) (emphasizing that an "interpretive canon is not a license for the judiciary to rewrite" legislation).

[4]*Accord Weinberger v. Rossi*, 456 U.S. 25, 28 (1982) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952)) (noting that canons of construction do not relieve a Court from having to look to the particular situation in question in construing a statute).

Here the Court need not even perform this analysis. As a threshold matter, the presumption is not properly applied here because the locus of the agency decisionmaking is solely within the United States.

threats.[5] In light of this international perspective, Congress has undertaken extensive efforts to regulate environmental threats caused by American actions far beyond this nation's borders.[6] Such legislative efforts seek to regulate American

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[5]The following *noninclusive* list of references to recent Congressional activity in the international environmental sphere demonstrates Congress' concerns about international environmental policy: S. 984, 102d Cong. 1st Sess. (1991) (International Pollution Deterrence Act of 1991); HR. 2358, 101st Cong., 2nd Sess. (1991) (Waste Export Control Act); S. 1278, 101st Cong. 2d Sess. (1991) (bill aimed at ensuring that judicial challenges to the National Environmental Policy Act of 1969 do not affect its extraterritorial application); *Bush Administration Proposes Measure to Ratify Basel Accord on Hazardous Waste*, 14 BNA Int'l Envtl. L. Rep. 237, 257 (1991) (Hazardous and Additional Waste Export and Import Act, covering transboundary shipment and disposal of wastes sent to Congress by President on May 6, 1991); *Wirth-Heinz Study Calls for Market Approach to Solve Global Warming, Solid Waste Issues*, 14 BNA Int'l Envtl. L. Rep. 273, 285 (1991) (Senator Wirth and late Senator Heinz's report on international trading systems as a means to solve international environmental problems of global warming and solid waste disposal); *see generally*, W. Morrissey, *Congressional Research Service Report for Congress: A Compendium of Legislation Introduced in the 101st Congress, 1st Session, Relating to Global Climate Change*, 1990 (reciting forty-nine separate legislative responses to global warming).

Moreover, as the Endangered Species Act itself demonstrates, Congress has long since removed its domestic blinders when legislating against environmental threats. The primary purpose of the Endangered Species Act was to implement a number of international environmental protection treaties concerning wildlife and its habitats. *See, e.g.*, 16 U.S.C. § 1531(a)(4) pledging as a member of the "International community . . . to conserve . . . the various species of fish and wildlife facing extinction. . . ."); 16 U.S.C. § 1533(b) (Endangered Species Act provision requiring listing of foreign endangered and threatened species); 16 U.S.C. §§ 1538(c), 1537(a)-(d) (Endangered Species Act sections implementing the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249). Further, the Act itself provides for extraterritorial judicial review. 16 U.S.C. § 1536(n) (providing jurisdiction to the D.C. Circuit). In fact, the only specific domestic limitations on the Act appear in parts of Section 9. *See* 16 U.S.C. § 1538.

[6]*See supra* n. 5 (setting out extraterritorial legislative efforts).

actions abroad even where there are only the most attenuated direct physical effects on domestic American health and safety.[7] This evidence of congressional environmental experience and intent transcending domestic concerns renders the underlying assumption in *Foley* inapplicable; Congress' concerns clearly go beyond domestic conditions.[8]

Congressional efforts to address international environmental threats are reflected in the understanding and experience of federal agencies regarding the global nature of environmental threats, including the President's Council on Environmental Quality, which recently noted that:

> Environmental problems do not stop at national frontiers, or ideological barriers. Pollution in the atmosphere and oceans taints all nations, even those

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[7]Legislation under consideration requiring American wastes disposed of overseas to meet United States disposal standards shows the extent to which congressional concerns about the environment extend beyond domestic interests. *See e.g.*, H.R. 3736, 101st Cong., 1st Sess. (1989); H.R. 2525, 101st Cong., 1st Sess. (1989). The Congressional intent underlying this legislation is primarily to protect citizens of the waste recipient nations:

> It would be utterly irresponsible and hypocritical for the United States to export wastes to other countries with environmental standards less strict than ours. This would be the equivalent of saying, "What is good enough for you is not good enough for us." I find this intolerable.

Lukens Subcommittee to Hold Hearings on Comprehensive Environmental Bill 2, Jan. 23, 1990 (press release from Rep. Tom Lukens); *Proposal Would Impose Strict Controls on Exports of Hazardous, Other Wastes*, 14 BNA Int'l Envtl. L. Rep. 273, 287 (1991) (quoting Representative Synar) ("We cannot justify a dual set of standards which afford less protection to citizens of other nations than we demand of ourselves.")

[8]*See United States v. Albertini*, 472 U.S. 675, 680 (1985) (judicial presumption of congressional intent is only valid to the extent that it actually reflects congressional intent).

> benignly favored by geography, climate or natural resources.

Council on Environmental Quality: The Executive Office of the President, *Environmental Quality: Twentieth Annual Report*, 260 (1990).

Congressional efforts reflect the understanding of the scientific community that environmental problems in one nation have both direct and indirect effects on surrounding nations, the global commons, and even upon nations geographically far removed.[9] Global warming, primarily caused by carbon dioxide emissions from developed nations, threatens to inundate island nations and turn America's wheat belt into America's dust bowl.[10] Pollution from American-owned-

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[9]*See* Committee on International Science's Task Force on Global Biodiversity: National Science Board, *Loss of Biological Diversity: A Global Crisis Requring International Solutions: A Report to the National Science Board*, 3 (1989).

> The loss of tropical moist forests can have profound and far-reaching effects, including: changes in climate, especially rainfall patterns; changes in biological productivity; soil erosion; and an increase in emissions of "greenhouse" gases, which further affects global climate.

Id.; G. Handl, *Environmental Protection and Development in Third World Countries; Common Destiny-Common Responsibility*, 20 N.Y.U. J. Int'l L. & Pol'y 603, 605 (1988) ("Environmental degradation in Third World countries tends to have multiple transnational repercussions."); *see also Developments in the Law: International Environmental Law*, 104 Harv. L. Rev. 1484, 1484 (1991) (quoting the Grateful Dead) (noting that in terms of global interconnectedness we have but one irreplaceable planet and nowhere else to run to).

[10]*See* World Meteorological Organization/United Nations Environment Programme: Intergovernmental Panel On Climate Change, *Climate Change: The IPCC Impacts Assessment*, 6-2 to 6-3 (1990) (discussing inundation of island states which could occur with only a one-meter rise in sea level); United States Environmental Protection Ageny, *The Potential Effects of Global Climate Change on the United States*, 101, 105, 177 (1989) (discussing effects of global warming on American agriculture in the wheat belt).

Mexican-based industrial development along the American border has already despoiled the regional watershed.[11]

Thus it must be assumed that Congress' experience and intent in addressing environmental threats which are inherently international, is based on an understanding of the extraterritorial nature of the threats.[12]

2. The Extraterritorial Application Of United States Laws To American Actions Abroad Does Not Give Rise To The Potential For International Conflicts.

The second assumption, that the extraterritorial application of American laws should be limited to prevent "clashes between our laws and those of other nations which could result in international discord," *Arabian American Oil Co.*, 111 S.Ct. at 1230, does not reflect the experience in the environmental field.

The extraterritorial application of environmental laws, including the Endangered Species Act, to actions of the United States government overseas fulfills the obligation under recognized principles of international law for all states to act in such a way "so as not to cause significant injury to the environment of another state. . . ." Restatement (Third) Foreign Relations Law § 601(1)(b) (1987). Further, international law recognizes that this obligation is not limited to actions of a country within its own jurisdiction, but applies to its actions

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[11]*See* L. Kochan, *The Maquiladoras and Toxics: The Hidden Costs of Production South of the Border*, 6-7 (1989); *Mexico's Maquiladoras — Free Trade, or Foul Play?*, E: The Environmental Magazine, July/Aug., 1991, 36, 36-37 ("Santa Cruz County, Arizona, had to declare a state of emergency after millions of gallons of raw sewage flowed into its system from Mexico. . . . [In] Nogales, Arizona, downstream from some maquiladoras, the hepatitis rate has shot up to 20 percent over the national average.").

[12]*See* Turley, *supra* n. 1, at 656.

internationally; "States have, in accordance with the Charter of the United Nations and principles of international laws . . . the responsibility to ensure that activities within their jurisdiction *or control* do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." Stockholm Declaration on the Human Environment, principle 21, *reprinted in* 11 I.L.M. 1416 (1972) (emphasis added).

All states must conform their actions to these international principles.[13] It is the American government's failure to avoid harming the environment of another state and its failure to provide the citizens of other nations the same environmental protection afforded to citizens within the United States, that creates the potential for international conflict.[14]

Thus it is more appropriate to assume that as Congress addresses environmental threats, which are inherently international, it does so with an understanding of the international legal obligation of each state to avoid causing environmental injury within another state.

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[13]In addition to the responsibilities of nations to regulate the conduct of their citizens and their agencies, international law-making in the environmental field is becoming more centralized, leaving less room for national standards to vary. *See* G. Handl, *Environmental Security and Global Climate Change: The Challenge to International Law*, 1 Yearbook of Int'l Envtl. L. 3, 12-13 (1991).

[14]*See* United States General Accounting Office, *Report to the Chairman, Environment, Energy and Natural Resources Committee on Government Operations, House of Representatives, Pesticides: Export of Unregistered Pesticides Is Not Adequately Monitored by EPA*, 27-29 (1989) (discussing inadequacies of EPA's procedures for notifying foreign countries); D. Weir, *The Bhopal Syndrome* (1986) (discussing the political damage caused by the United States failure to prohibit the manufacture and export of herbicides and pesticides banned in the United States).

II. CONTEMPORARY ASSUMPTIONS ABOUT CONGRESS' EXPERIENCE AND INTENT SHOW THE NEED TO REVERSE THE *FOLEY* PRESUMPTION SO THAT ENVIRONMENTAL STATUTES ARE PRESUMED TO APPLY EXTRATERRITORIALLY.

Congress is increasingly required to legislate solutions to global environmental threats. In order to avoid frustrating Congress' efforts, any presumption regarding extraterritoriality must recognize that "the extraterritorial enforcement of United States laws is becoming increasingly important to the nation's ability to protect its own vital interests."[15] Such a presumption must also recognize that Congress understands the international nature of environmental threats; that Congress understands that conflicts with the laws of other nations will be avoided where United States environmental laws prevent harm to the environment of other states; and that Congress legislates accordingly. These contemporary assumptions, together with the urgency of global environmental threats, require reversal of the *Foley* presumption so that United States environmental statutes are now presumed to apply extraterritorially.

Reversing the presumption provides Congress with clear guidance in drafting legislation and prevents frustration of congressional efforts that are practically or logically extraterritorial in scope.[16] Such a presumption still leaves courts free to

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[15]Wash. Post, Aug. 14, 1991, A14, col. 1 (quoting Department of Justice memorandum on international terrorism and drug trafficking).

[16]*See* Turley, *supra* n. 1, at 662 (noting that a presumption in favor of extraterritoriality provides Congress with notice of what is expected of it in crafting new legislation, and avoids the legislative pitfalls inherent in requiring congressional efforts to overcome a presumption against extraterritoriality). For evidence that Congress has not received clear guidance from the decided cases, compare the conflicting holdings in the market-based and non-market cases regarding extraterritorial jurisdiction. *See, infra* nn. 18, 19 and accompanying text.

examine on a case-by-case basis whether the statute in question is on its face not extraterritorial.[17] Similarly, after determining the extraterritoriality of a statute, any potential issues of conflicts of law can be resolved under traditional analyses.

III. CONSISTENT WITH THIS COURT'S PRIOR DECISIONS, ENVIRONMENTAL LAWS SHOULD APPLY EXTRATERRITORIALLY BECAUSE OF THEIR HARMFUL DOMESTIC EFFECTS.

A. A Finding of Harmful Domestic Effects Is Sufficient to Find Extraterritorial Jurisdiction.

Statutes with ambiguous congressional intent have been applied to regulate actions outside the United States where those actions would have harmful effects within the United States.[18]

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[17] *See Foley*, 336 U.S. at 285 (noting presumption only applies where statute is silent as to congressional intent).

[18] Statutes which have been given extraterritorial reach include the Sherman Act, 15 U.S.C. §§ 1, 2 (applying, resepectively, to "[e]very contract . . . in restraint of . . ." and "[e]very person who shall monopolize, or attempt to monopolize . . . any part of" "the trade or commerce among the several States, or with foreign nations"); and the Securities Exchange Act, 15 U.S.C. §§ 78c(a)(17) (interstate commerce includes "trade, commerce, transportation or communications . . . between any foreign country and any state. . ."); *see also Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 701 (1962) (finding Sherman Act applies to acts by U.S. and Canadian corporations which occurred in Canada and had effects in U.S.); *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952) (applying Lanham Act in a trademark action to acts committed in Mexico that "radiated" effects in U.S.); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (applying Sherman Act to acts committed in Mexico furthered by preferential Mexican legislation); *Thomsen v. Cayser*, 243 U.S. 66 (1917) (permitting prosecution for conspiracy organized abroad on the basis of presumed domestic effects); *United States v. Pacific & Arctic R. & Navigation Co.*, 228 U.S. 87 (1913) (extending jurisdiction over a Canadian corporation where conduct took place both inside and outside the U.S.); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911) (applying Sherman Act to an agreement executed in England to monopolize both exports from and imports to the United States).

This "effects test" is applied primarily in market-based cases; in non-market cases, despite virtually identical jurisdictional langauge, courts have generally restricted their inquiry to the four corners of the statute and have not looked for domestic effects.[19] While the effects test leaves room for courts to balance competing interests such as conflict of laws,[20] such conflicts have not prevented courts from finding extraterritorial jurisdiction.[21]

B. Actions Which Damage the Environment Outside the United States Have Direct and Substantial Harmful Effects Within the United States.

Environmental problems, including species loss, cannot be confined within national borders.[22] The tremendous value that

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[19]Statutes which have been limited to domestic application include the Labor Management Relations Act, 29 U.S.C. § 141 (which applies to industries affecting "commerce" between any foreign country and any foreign state"); and the Federal Employees Liability Act, 45 U.S.C. § 51 *et seq.* (which provides that railroads engaged in "interstate commerce or foreign commerce" or commerce between "any of the States or territories and any foreign nation or nations" shall be liable to employees who suffer injuries resulting from their employment). *See EEOC v. Arabian American Oil Co.*, 111 S.Ct. 1227 (1991) (employment discrimination between private parties in Saudi Arabia); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (Liberian tanker attacked by Argentine military planes in international waters); *Foley Bros. v. Filardo*, 336 U.S. 281 (1948) (labor dispute between private parties in Iran and Iraq); *New York Cent. R.R. v. Chisholm*, 268 U.S. 29 (1925) (injury of railroad employee 30 miles inside Canada).

[20]*See Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 615 (9th Cir. 1976) (adopting three-tiered conflicts test).

[21]*See* D. Rosenthal & W. Knighton, *National Laws and International Commerce*, 18-42 (1982) (discussing the substantial conflicts with the laws of other nations that have arisen in market effects cases); *see also Timberlane*, 549 F.2d at 608 n. 12 (1976) (noting that, out of 248 foreign trade antitrust cases filed by the Department of Justice, not one was lost for want of jurisdiction).

[22]Species do not respect national borders. Both migratory and non-migratory species' ranges can include habitats within more than one

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species have for humans means that the loss of even one species carries with it considerable economic and social costs, and has a direct and substantial effect on the ability of the United States, and humankind in general, to sustain themselves.[23] Considering that it is estimated that each day the world loses over one hundred species, the economic, social, and intangible costs to humankind become staggering.[24]

For instance, plant-derived drugs play a significant role in saving human lives around the globe.[25] Many of the world's

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nation, and it is not possible to preserve the global value of these international species through purely national schemes of protection. *See Secrets of Animal Navigation*, Nat'l Geographic, June 1991, at 70, 70-99 (discussing numerous examples of species that migrate internationally); *see Shrinking Herds and Habitats*, Nat'l Geographic, May, 1991, at 14, 14-15 (mapping habitat ranges of the African elephants across the national borders of no less than 35 countries and Asian elephant habitat ranges encompassing at least ten countries).

[23]*See* Council on Environmental Quality: The Executive Office of the President, *Environmental Quality: Twentieth Annual Report*, at 262 (1990):

> Improved scientific understanding of complex ecological interrelationships has helped to blur the distinction between international and domestic concerns. It is now understood that local or regional economic activities may have serious international consequences from direct, indirect or cumulative environmental effects. For example, economic development that contributes to the loss of a species, even within a relatively small region of the world, may have broad international implications.

Id.

[24]*See Species Loss: Crisis or False Alarm*, N.Y. Times, Aug. 20, 1991, at C1, col. 1. Noted biologist Dr. Edward O. Wilson of Harvard University, has calculated that 50,000 species are lost per year, or roughly six every hour of every day. *Id.* Dr. Wilson has likened the rate of species loss to a "genuine holocaust." *Id.; see also J. Abramovitz, Investing in Biological Diversity: U.S. Research and Conservation Efforts in Developing Countries*, 1 (1991).

[25]*See Loss of Biological Diversity, supra* n. 9, at 10; K. Miller & L. Tangley, *Trees of Life Saving Tropical Forests and Their Biological Wealth*,
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most important crops originate from the tropics and have been introduced by humans into other regions.[26] Remaining wild relatives and regional varieties are important sources of genetic diversity that play a major role in ensuring the long-term survival of crops against the traditional threats from pests and diseases, and new threats, such as those from global warming and ozone depletion.[27]

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23-25(1991); *Investing in Biological Diversity, supra*, n. 24, at 1-2 (1991) (even in the United States 25% of all prescriptions contain active ingredients that are still extracted from plants).

Nearly half the drugs in use today were developed from substances initially found in nature: products of plants, fungi and microorganisms. *See Loss of Biological Diversity, supra* n. 9, at 10. The benefits humankind can reap from one small species is dramatically demonstrated by the profound effects of the Madagascar Rosy Periwinkle *(Catharanthus roseus). Id.* Thirty years ago, a child with leukemia stood only a one-in-five chance of recovery, and affliction with Hodgkins disease was nearly always fatal. *Id.* Today, thanks to drugs derived from this tropical dry-forest plant, remission rates for leukemia victims stand at 99% and for Hodgkins sufferers at 70%. *Id.*

The tremendous medicinal wealth already derived from plant species pales in comparison to the untapped potential of these plant species; the large number of plant-derived drugs in use today come from fewer than 90 of the 250,000 identified plant species. *See Trees of Life, supra,* at 24.

[26] *See Investing in Biological Diversity, supra* n. 24, at 3. Asian derivative species include: soybean, wheat, rice, oranges, bananas, coconuts, sugar cane, apples, grapes and carrots. *Id.* Latin American agricultural species include: maize, potatoes, beans, manioc, tomatoes, cotton, tobacco and rubber. *Id.* Africa's agricultural contributions include: coffee, sorghum, millet, wheat and barley. *Id.*

[27] *See Loss of Biological Diversity, supra* n. 25, at 10. For example, the recent discovery of a perennial, virus-resistant, wild relative of maize, *Zea diploperennis*, has significant agricultural benefits. The rare Zea species is known to occupy only a single six-hectare site in Mexico, and was as likely to be lost to extinction as it was to be discovered. *Id.*

Moreover, the discovery of the intricate balance between species and ecosystems has repeatedly demonstrated that the survival of many of the world's valuable industries are entirely dependent on the survival of one or a few species.[28] For example, the loss of certain insect species could cause the demise of the Malaysian hardwood industry; extinction of the forest elephant could destroy the African forestry industry.[29]

Anyone who has ever watched a flock of geese pass overhead on their way to their winter home in Mexico, or a cheetah in full stride glide sinuously across the African plains, understands that the economic values of a species fail to reflect their intrinsic value.[30] The loss of these intrinsic values also has con-

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[28]Animal species often serve as keystone species for entire ecosystems: if the keystone species is removed the ecosystem can "crash" and all its beneficial resources can be lost. *See* J. Brown & E. Heske, *Control of a Desert-Grasssland Transition by a Keystone Rodent Guild*, 250 Science 1705 (1990); *See also Trees of Life*, *supra* n. 25, at 19; P. Ashton, *Dipterocarp Reproductive Biology*, *in* H. Lieth & M. Werger, M., eds., *Tropical Rainforest Ecosystems: Biogeograpahical and Ecological Studies*, 219 (1989) (discussing role of insect species in pollination of Malaysia's dipterocarps); D. Chadwick, *Elephants: Out of Time, Out of Space*, Nat'l Geographic, May, 1990, at 2, 27-29 (discussing role of forest elephants in maintaining Africa's low-land forests).

[29]*See Ashton, supra*, n. 28 (discussing insect pollination of Malaysian hardwood); Chadwick, *supra*, n. 28 (discussing role of forest elephants in forest maintenance).

[30]The eminent conservationist Aldo Leopold notes of this intrinsic value:

> My notes tell me I have seen a thousand geese this fall. Every one of these in the course of their epic journey from the arctic to the gulf has on one occasion or another probably served man in some equivalent of paid entertainment. One flock perhaps has thrilled a score of schoolboys, and sent them scurrying home with tales of high adventure. Another, passing overhead of a dark night, has serenaded a whole city with goose music, and awakened who knows what questionings and memories and

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siderable effects within the United States; indeed, humankind's failure to protect the intrinsic values of the environment is a significant factor in most environmental problems.[31]

These dramatic global environmental effects make the argument for applying the "effects test" to environmental cases even more compelling than for market cases. Markets can recover from even the most damaging effects of extraterritorial actions. Once a species becomes extinct, however, it is lost forever. Environmental effects are no more remote or attenuated than market effects. Indeed, actions which harm the environment have direct and substantial impacts on the very markets which market statutes seek to protect.[32] Nor can it be argued that

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> awakened who knows what questionings and memories and hopes. A third perhaps has given pause to some farmer at his plow, and brought new thoughts of far lands and journeyings and peoples, where before was only drudgery, barren of any thought at all. I am sure those thousand geese are paying human dividends on a dollar value. Worth in dollars is only an exchange value, like the sale value of a painting or the copyright of a poem. What about replacement value? Supposing there were no longer any painting, or poetry, or goose music? It is a black thought to dwell upon, but it must be answered. In dire necessity somebody might write another *Iliad*, or paint an 'Angelus,' but fashion a goose?

A. Leopold, *A Sand County Almanac*, 229 (1949).

[31]See B. Piaseki & P. Asmus, *In Search of Environmental Excellence: Moving Beyond Blame*, 33-34 (1990). Current theory suggests that the fall of early Greek and Roman cultures was caused in part by the environmental degradation these societies brought upon themselves through their improper practices of resource management, including their abuse of animal species. *Id.* For instance, at the dedication of the Colosseum under Titus 9000 animals were slaughtered in a 100-day bacchanalian orgy of destruction. *Id.*

[32]*See* Dupont, *Corporate Environmentalism: A Collection of Remarks by DuPont Chairman, E.S. Woolard, Jr.*, (Nov. 19, 1990) (remarks given at Detroit Economic Club):

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environmental effects are not "intended."[33] Scientific understanding of the interrelated nature of the environment is too well developed — and widely appreciated — to plead ignorance of the extraterritorial effects which environmental harms are likely to cause. Actions which once might have been taken in excusable ignorance, today could only evince a reckless disregard for the foreseeable consequences.

It is their global nature and their consequent extraterritorial effects which distinguish environmental problems from the concerns addressed by labor and employment statutes, such as Title VII of the Civil Rights Act, recently considered in *EEOC v. Arabian American Oil Co.*, 111 S.Ct. 1227 (1991). To find evidence that Congress recognizes this distinction, it is only necessary to compare the broad array of international environmental agreements to which the United States is a party[34] with the dearth of international agreements addressing conditions of labor and employment.[35] Moreover, extraterritorial

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> Environmental issues . . . are now core values of the majority of consumers, and increasingly will drive our competitive future to improve the value of our goods and services. To be successful, our business operations and future developments must be in harmony with the public's understanding of environmental stewardship. Environment is both a societal and economic imperative for the 90's.

Id. See generally C. Morrison, *Managing Environmental Affairs: Corporate Practices in the U.S., Canada and Europe* (1991).

[33]The test for extraterritorial application of antitrust statutes is sometimes called the "intended effects" test, since the defendant must intend market effects. *See* Turley, *supra* note 1, at 611.

[34]*See* United States International Trade Commission, *International Agreements to Protect the Environment and Wildlife: Report to the Committee on Finance, U.S. Senate, on Investigation No. 332-287 Under Section 332 of the Tariff Act of 1930*, app. F (1991).

[35]Only one group of U.S. treaties has been found which affect labor and employment. The Treaties of Friendship, Commerce and Navigation have been held to provide foreign corporations operating in the U.S. with a partial *exemption* from Title VII. *See Speiss v. C. Itoh & Co.*, 643 F.2d 353 (1981).

actions are capable of causing precisely the type of environmental harm *within the United States* that Congress has sought to prevent.

Petitioner acknowledges that extraterritorial actions can have domestic environmental effects. Indeed, the Petitioner relies on the assertion that the inclusion of foreign species in the protection afforded by § 7 of the Endangered Species Act is explained by Congress' desire to protect *foreign* species from federal actions here or on the high seas. *See* Brief for the Petitioner at 35, note 23. It is logical that Congress intended to extend the same protection to *domestic* species from federal action abroad. Because the Endangered Species Act draws no distinction between domestic and foreign species, it follows that Congress also intended to protect foreign species from federal actions abroad.[36]

To fail to extend extraterritorial reach to § 7 would greatly curtail the scope and usefulness of the Endangered Species Act,[37] and would not accord with Congressional intent as expressed in § 7 and other sections of the statute. Accordingly, the Court should follow the well established rule in the long line of antitrust and other market-related cases, and extend extraterritorial jurisdiction to § 7 of the Endangered Species Act.

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[36]This discrepancy in the Petitioner's reading of § 7 arises because Petitioner's interpretation is inconsistent with the "scheme" of the Endangered Species Act. *See Foley*, 336 U.S. at 286 (explicitly relying on the scheme of the statute to buttress its conclusion that Congress did not intend the Lanham Act to have extraterritorial reach). Additionally, it is schematically illogical to recognize a species as endangered, and provide it significant national protection, and at the same time, allow the same government which protects it nationally to destroy it internationally.

[37]The Court has inferred Congressional intent to extend extraterritorial jurisdiction where "to limit [the] locus [of the offense] to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute. . . ." *United States v. Bowman*, 260 U.S. 94, 98 (1922).

CONCLUSION

The *Foley* presumption does not apply to environmental law because *Foley's* underlying assumptions do not apply. In the environmental field Congress has shown that it understands and is concerned with international and extraterritorial effects. Congress also has shown that it understands that international law requires United States environmental laws to apply abroad to avoid harm to the environment of other states. Further, Congress understands that potential conflicts could arise between United States laws and those of other nations if United States environmental laws are *not* applied extraterritorially.

Congress' contemporary understanding and concern with international environmental issues requires that the *Foley* presumption be reversed, so that where an environmental statute is ambiguous it will be presumed that Congress intends the legislation to apply extraterritorially.

If the presumption is not reversed, environmental problems have sufficient effects within the United States even when they occur abroad, to satisfy the "effects" test that has been used to sustain the extraterritorial application of antitrust and other market-based statutes. Accordingly, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

1. Ecotropica is a Brazilian nongovernmental organization whose primary missions are establishing protected areas and encouraging the sustainable use of natural resources as a guarantee of the quality of life of society as a whole. Ecotropica is currently focusing its efforts in Brazil's Mato Grosso and the La Plata River Basin regions.

The Mato Grosso contains one of the largest contiguous wetlands in the world, the Pantanal, and part of the most biologically diverse savannah in the world, the Cerrado. The Pantanal region contains habitat which supports such endangered animals as the jaguar, the marsh deer, the maned wolf, the giant anteater, the hyacinth macaw, and the giant otter. A special emphasis within Ecotropica's Pantanal program is ensuring the continued survival and replenishment of the jaguar.

Development efforts, funded in part or in whole by United States' monies, both directly and indirectly through multilateral development banks, have already adversely affected these regions and have the potential to inflict even greater adverse consequences. For example, the World Bank, of which the United States is the majority shareholder, is funding DDT spraying in and around these regions. The use of DDT, which in the United States caused the American bald eagle to become endangered, has already proven its adverse effects on the survival of flourishing species, let alone those already endangered. Ecotropica is similarly concerned that future United States involvement will cause even greater harms to the species Ecotropica is working so diligently to preserve.

2. The Slovak Union of Nature and Landscape Protectors was founded in 1969 as a voluntary organization. It is an association of individuals, organizations and institutions of the

Slovak Republic involved in protecting nature and landscape. SZOPK's goals are to further public awareness of environmental issues, to increase public participation in solving both short-term and long-term environmental problems and to influence decision making.

SZOPK has hundreds of local chapters, working on a variety of local, national and international environmental issues. Many of the chapters are involved with the preservation of rare and endangered species. For example, some chapters work to preserve the Hucha Hucha, a rare fish of the salmon family found only in the Danube river system. Chapters are also actively working to protect rare birds such as the Eurasian peregrine falcon and the sokol falcon. Other areas of involvement include efforts to preserve specific species of plants, lizards, and amphibians.

The environmental impact of United States activities abroad is already being felt in the Czech and Slovak Federal Republic. For example, United States efforts to build a Voice of America broadcast tower in Israel will adversely affect the Eurasian Peregrine falcon, which SZOPK is trying to preserve in the Czech and Slovak Republic. SZOPK is also concerned that in the future United States activities will become more prevalent and may adversely affect the other species it is working to protect.

3. Fundación de Parques Nacionales is a Costa Rican non-profit foundation dedicated to promoting the establishment, protection and management of national parks and reserves in Costa Rica. An essential element of Fundación Parques Nacionales efforts to preserve these areas is the protection of the species which inhabit them. These efforts focus on preserving the quality of the flora and fauna of Costa Rica's unique tropical dry forests, including La Amistad Biosphere Reserve. Nominated for inclusion as a World Heritage Site by the United Nations

Educational, Scientific and Cultural Organization, La Amistad is one of the richest and most varied ecosystems in Central America. Fundación de Parques has also been instrumental in working to preserve the Costa Rican leatherback sea turtle and its habitats. Each of these two projects, drawn from the over 35 ongoing projects of the Fundación, involves efforts to protect highly fragile ecosystems and the threatened or endangered species that inhabit these ecosystems. If this Court does not recognize that the protections of the Endangered Species Act apply in Costa Rica and other nations, the efforts of the Fundación will continue to be directly and adversely affected.

4. Greenpeace International (formally known as Stichting Greenpeace Council) is a Netherlands nonprofit foundation that coordinates and assists Greenpeace organizations in more than 23 countries around the world with more than 4 million contributors. Greenpeace International engages in research, education, lobbying, direct action, litigation and advocacy to protect and preserve the global environment.

In the course of its work, Greenpeace International regularly confronts the global nature of environmental problems and their solutions. Many of Greenpeace's efforts to defend endangered and threatened species relate to regions in which activities funded or otherwise assisted by the United States directly affect environmental quality. Examples include Greenpeace's campaigns to protect rainforests and the many unique species that inhabit such ecosystems in Latin America and Southeast Asia and to preserve Antarctica and the species which live or migrate through it. These efforts are being adversely affected by the failure to apply the United States Endangered Species Act, including section 7, to activities funded, assisted or directly undertaken by United States agencies in other countries.